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C. H. LOMAX, M.A., OF THE INNER TEMPLE,
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THE
LAW MAGAZINE AND REVIEW.

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I.—THE STATE AND PRIVATE LIFE IN ROMAN LAW.

THE theory of State absolutism was not carried as far at Rome as it was in the Greek States and in the ideal commonwealths of Plato and Aristotle. There was, for instance, at Rome no public system of education, no fettering of choice in marriage by allowing it only as a contract entered into by the intervention of the State, there were no *syssitia* as at Sparta, and there was no artificial cultivation of moral virtue, as recommended by Aristotle. The physical difference between the small Greek State and the all-embracing Roman Empire is at the root of most of the differences in policy. The maxim of Aristotle *οἱ νόμοι ἀγορεύονται περὶ ἀπάντων** would hardly have been accepted as good law by a Roman jurist, unless with a necessary extension of *νόμοι* to include *boni mores*.† *Boni mores* as a ground for the intervention of, at first the family and the clan, later the State,‡ rested on precedents of the highest antiquity, for instance in the superseding of private vengeance by public prosecution, in the limitation of the excessive exercise of the *potestas* over both women and children and slaves, and in certain provisions of the XII Tables dealing with sumptuary matters. The importance of the moral

* *Ethics*, v., 1, 13.

† See Muirhead, *Roman Law*, p. 21.

‡ The late Professor Hearn was of opinion that one of the main influences of Christianity was to supersede the clan by the State. *Aryan Household*, p. 45.

element appears perhaps most strongly in the infliction of punishments depending for their force on the social sanction, and falling peculiarly within the jurisdiction of the censors during the Republic, and afterwards of the Emperor as *parens patriæ*. The *nota censoria* gradually hardened into positive law, and *infamia* was recognised in the Edict,* though probably not until after its limits had been settled by the censors.† Punishments of this kind were sometimes the result of crimes or fraudulent or dishonourable conduct, sometimes only of a breach of *boni mores*, such as lack of the *obsequium* due to a parent or patron,‡ or (at any rate in the case of the *nota censoria*) even for bad cultivation of land.§ Accustomed thus to regard the State as affecting with the legal sanction matters which in English-speaking countries are generally left to be regulated by the social sanction,|| the subjects of the Roman Empire, even at the time of the legislation of Justinian, were more “governed” than would have seemed expedient to an average English lawyer. *Utilitas publica præferenda est privatorum contractibus*¶ is a necessary maxim of Law, it is the interpretation of *utilitas* which will cause the principal differences in the law. Roman Law regarded mainly the *utilitas*, English regards as final *privatorum contractus*, as long as they are not abso-

* *Dig.* iii., 2, 1.

† See *Valerius Maximus*, ii., 9. He calls the censorship *pactis magistra custosque*.

‡ *Dig.* xxxvii., 15, 2; *Cod.* vi., 6. *Reverentia* is used in a similar sense in *Cod.* viii., 47, 5, for the conduct due from a daughter to a father.

§ *Dict. of Antiquities*, s.v. *Nota Censoria*.

¶ The different functions of Prudence, Probity, and Beneficence had not then been analysed by any Roman Bentham. That they are not always distinguished even at present is obvious after a glance at the Constitution of the State of California, analysed by Professor Bryce in his *American Commonwealth*.

|| *Cod.* xii., 63, 3. Compare the similar maxim of *Dig.* ii., 14, 38, *jus publicum privatorum pactis mutari non potest*.

lutely illegal. The theory of Roman Law carried out to its logical conclusion is the foundation of the *Droit Administratif* and of the *Staatsrecht*, which have no counterpart in English law.

But while from this point of view the rights of individuals were ignored, it must not be forgotten that at the same time Roman Law was essentially a law which respected persons, and paid regard to custom and privilege. A considerable amount of freedom was allowed to nations incorporated in the Empire. Self-government was permitted to a limited extent, including sometimes the use of the local laws, such as the *lex Hieronica*, frequently mentioned by Cicero in his Orations against Verres, and the Gothic family customs, which, in the opinion of Savigny and others, must have existed under the *Edictum Theodosi*. Down to the time of Justinian the Armenians preserved their own rules of succession.* Foreign worship was allowed and sometimes adopted, as in the case of the cult of Isis. The Jewish worship was permitted, as may be seen from the Novels† as well as from the New Testament; and Jews were not to be compelled to work on their holy days.‡ The *municipia* might collect the taxes in their own way, provided that the due amount was forwarded to the Treasury. Occasionally the Adjective Law was affected by local custom. Thus, the *dupla stipulatio*, usual at Rome as a condition of sale, was liable to local variation, at all events in the sale of a *fundus*.§ The time of sowing and harvest was kept free from litigation at periods varying according to the custom of the province.|| Roman Criminal Law affords the best illustration of the regard paid to privilege. Such law was essentially (except in a few crimes

* *Nov. cxxi.*

† *Nov. cxlii.*

‡ *Cod. i., 9, 2.* This was subject to the somewhat important proviso that they should believe in the resurrection and the last judgment, *Nov. cxlii., 2.*

§ *Dig. xxi., 6, 2.*

|| *Dig. ii., 12, 4.*

in which all were equal, such as treason), "class legislation," if the use of a much-abused term may be pardoned. A good example occurs in the provisions of *Nov. xc.*, enacting that torture can only be applied where the witnesses are unknown and obscure.* The position of a criminal might be such as to give him immunity. Total or, partial immunity from the ordinary criminal jurisdiction was given to the nobility, the clergy, regular and secular, soldiers, decurions, &c.† The privilege of immunity might be conferred by the Emperor by means of Pragmatic Sanction on any one whom he chose.‡ The privilege attached sometimes in Civil as well as Criminal matters. Those of the rank of *illustris* could proceed by procurators when inferior persons were not allowed to do so.§

The tendency in favour of recognition of privilege was not, however, the only one of which it is necessary to take account in the estimation of the influence of the State in private life. Due allowance must be made for the contrary tendency favoured by the Stoic Jurists of making the law equal for all, since by nature all are equal. *Quod ad jus naturale attinet, omnes homines aequales sunt.*¶ Hence no doubt proceeded the universal citizenship, the abolition of agnatic relationship, and the gradual superseding of the criminal jurisdiction of the *forum domesticum*,|| examples of which are found even under the early Empire where women were

* The rules for inflicting torture were very minute and precise. See the *Encyclopædia Britannica*, 9th ed., s.v. "Torture" (by the writer of this article).

† See for instance *Dig. xl ix.*, 18; *Cod. iii.*, 24; *x.*, 31; *Nov. lxxix.*, lxxxiii. Poets, it may be noted, could claim no immunity as members of any privileged class, *Cod. x.*, 52, 3.

‡ *Nov. lxxix.* § *Nov. lxxi.* || *Dig. i.*, 17, 32.

¶ It was finally abolished in grave cases by Alexander Severus in 227, *Cod. viii.*, 47, 3.

the offenders.* In developing the theory of State intervention there were thus three main influences at work, the conception of the Republic (through the Censors), later of the Emperor, as custodian of *boni mores*, the weight attaching to local and personal privilege, and the philosophical conception of universal equality. With all these influences at work it will be found, as might be expected, that the *Corpus Juris* does not present a very consistent view of State interference. It interferes in some extremely petty matters and neglects some of far greater importance, such as education.† All that will be attempted in this place is to put together in a convenient form, which does not profess to be a scientific arrangement, some of the modes of State interference with private life recognised in Roman Law. They occur in greater number in the Code and the Novels than in the Digest, as they were usually the effect of direct legislation rather than of judicial decision or of opinion of the *prudentes*. In many of these cases it is noticeable that the laws were *minus quam*

* See examples in Livy, xxxix., 8, for the late Republic; Tacitus, *Ann.* xiii., 32, for the early Empire. Survivals of the theory of the *forum domesticum* appear very often in the Spanish *Romancero* and the Portuguese *Romanceiro*. It is quite a common form in the ballads in these collections for a father to condemn an erring daughter to be burned alive.

† Education in the Roman Empire, even when recommended by philosophers like Quintilian and Plutarch, was to affect only children of citizens in good circumstances. The system of universal education conducted by the Church in Church Schools, as far as it existed in the time of Justinian, was provided by voluntary effort. No words corresponding to "education" or "school" appear in the *Corpus Juris*. *Schola* means only a guild of secretaries, gladiators, or other associated members of professions and trades. Sometimes municipalities, at other times private persons, provided public free schools. Thus Pliny gave a sum equal to £5,000 to provide a school at Como. The profession of schoolmaster, as lines of Horace and Juvenal show, was poorly paid and of low social importance. Among the children of the wealthier classes who were privately educated, Roman Law was a subject of study. Cicero learned the XII Tables as a *carmen necessarium*; see *De Legibus*, ii., 23.

perfectæ and imposed no penalty. The reason for this is not always obvious, unless it be that these laws of imperfect obligation were intended to be "counsels of perfection" rather than commands, but the fact is particularly striking in some of the trade and sumptuary legislation.

The Family.—As early as the XII Tables there are traces of the legal limitation of the *Patria Potestas*, especially in the provision that if the son were sold for a third time, he was to be free from the *potestas*. The gradual recognition of *peculium*, *castrense* and other, as a quasi-legal right, was an advance in the same direction. But to the latest period the consent of the *paterfamilias* to the marriage of a child under the *potestas* was, with few exceptions, legally necessary. The most important instance of interference with the family was the creation of a new idea of the family, beginning with the innovations of the *Prætor* in the Law of Succession by granting succession to new classes of successors in regular order (expressed in legal language by *Unde, unde liberi, &c.*), and becoming complete by the abolition of agnatic relationship as a basis of inheritance by *Nov. cxviii.* The effect of this change in the law was to make no relations those who had been previously regarded as relations, perhaps the most considerable interference with private life occurring in Roman Law. The enforcement of at least outward signs of affection on the part of children and freedmen was enforced by law. An emancipated child might be reduced again under the *potestas* for reviling (*convicium*) the *paterfamilias*.* So might a freedman for ingratitude.† The affection might not always take the form of a present. The *Lex Cincia* (about B.C. 204) forbade the making of presents between certain relations, and gifts as between husband and wife were considerably fettered, the object of marriage being stated to the satisfaction of an

* *Cod. viii.*, 50.

† *Cod. vi.*, 7, 2.

honourable love, not the making of profit.* There was much legislation as to marriage, and there were very numerous restrictions, quite apart from consanguinity or affinity. For instance, down to the *Lex Canuleia*, in B.C. 445, patricians and plebeians could not intermarry. Senators could not marry women of low rank. Mixed marriages, as between Jews and Christians, were generally invalid.† Marriages were allowed, to a limited extent, but not encouraged, between free men and *libertinæ* or *ancillæ*.‡ At the time of Justinian there was a tendency to exalt celibacy, especially monastic, at the expense of family life, a striking contrast to the pagan legislation imposing disabilities on *cælibes* and *orbi* as a remedy for the *vitio parentum rara juventus*, and even, under the *Lex Papia Poppæa*, enforcing re-marriage on widows under fifty. Hence second marriages were the subject of very numerous regulations,§ chiefly as to the devolution of the property of the deceased husband or wife, a matter which in Modern Law is usually the result of private contract contained in a marriage settlement. Marriage of a widow *intra tempus luctus* was invalid.|| An *ancilla* manumitted and married by her manumittor could not re-marry after divorce from him.¶ One who had married a second time could not be a priest

* *Dig.* xxiv., 1, 3. Small gifts on the Kalends of March seem to have always been customary, as appears from *Hoface*, *Od.* iii., 8, 1 —

Martiis cælebs quid agam Kalendis.

† *Cod.* i., 9, 6.

‡ The opinion of Martial (iii., 33) was not in accordance with strict law.

*Ingenuum malo, sed si tamen illa negatur
Libertina mihi proxima conditio est.
Extremo est ancilla loco, sed vincet utramque
Si facie nobis hæc erit ingenua.*

§ The opinion expressed by Heine in his *Wer zu erste Male liest*, &c., was adopted as a principle by the later Roman Law. Only in Heine's view the offender was but a fool; in the view of the Christian Emperors he was a criminal.

|| *Nov.* xxii., 40.

¶ *Nov.* xxii., 37.

or a deaconess.* The discouragement of third marriages was carried still further; a Constitution of Leo the Philosopher actually made such marriages punishable.† For several centuries, to be a bachelor, or, if married, to have no children, rendered the offender liable to distinct legal penalties, such as inability to take by inheritance or legacy, even by *fidei-commisum*.‡ On the other hand the *jus liberorum* gave the privileges of freedom and succession to women not otherwise qualified.§ The laws against *cælibes* and *orbi* and the *jus liberorum* were abolished soon after the introduction of Christianity had, as has been already mentioned, tended to the exaltation of monasticism. The diminished importance of the family as the unit of society was no doubt the ground of the rule that a change of name was allowed to be made without any formality.||

Property.—The interference in this branch is to a smaller extent than in some others. The XII Tables, in the well-known clause, *Uti legassit suæ rei ita jus esto*,¶ opened the way to a large dealing with property uncontrolled by Law, except in the most general way, as by the laws defining the grounds of disinherison, the formalities necessary for the validity of a will, &c. One important early case of State control occurs in the case of the Licinian laws in B.C. 367, forbidding a citizen to hold more than 500 *jugera* of arable land, or graze more than 100 oxen and 500 sheep upon the public pastures. Similar attempts at limitation afterwards cost the Gracchi their lives. One of the disabilities of owners of slaves existing down to the time of Justinian

* *Nov. cxxiii.*, 13.

† *Const. xc.*

‡ *Gaius*, ii., 241, 286. It is stated by *Valerius Maximus* (ii., 9) that the Censors fined *cælibes* as early as B.C. 452.

§ *Gaius*, i., 194; *Inst.* iii., 3, 2.

¶ *Cod. ix.*, 25.

|| *The formula* as cited by *Ulpian* (*Regulae*, xi., 14) contains the words *super pecunia tutelave*, but these words do not appear in the formula as given by *Gaius* and *Justinian*, and are perhaps the gloss of an interpreter.

was that attaching by the *Leges Aelia Sentia* and *Fusia* (or *Fufia*) *Caninia*, of the dates respectively of A.D. 4 and A.D. 8. They forbade manumission in fraud of creditors and to the prejudice of the inheritance, in the latter case by limiting the number allowed to be manumitted by a testator to a maximum of 100. The only limit retained by Justinian in the latest stage of the Law was that the manumittor must be fourteen years of age.* There appears to have been no restraint on property in Roman Law in the nature of the partial monopoly given by Modern Law in patent and copyright. Regulation of property by the State for the purposes of public health existed only in embryo. Some special building regulations appear in addition to the general jurisdiction exercised by the Senate with regard to theatres (see below), by the *Ædiles*, and by the *Prætor* through the *Stipulatio damni infecti*,† which superseded the procedure by *legis actio*, nominally competent in cases of threatened damage after its abolition in most other matters.‡ By the XII Tables a clear space of two feet and a half was to be left around every house. A public building could only be inscribed with the name of the Emperor or the private person who gave it.§ The provisions of the title *De Ædificiis Privatis*|| in the Code contain very numerous regulations of a similar nature, e.g., that a bath was not to exceed the customary height, that statues and columns might not be removed, that in certain provinces private estates might be surrounded with walls, that buildings in Rome must not exceed a certain height and breadth, and where surrounded with a colonnade, that a space for exit and entrance must be left after every four

* *Nov. cxlii. 2.*

† *Dig. xxxix., 2.*

‡ *Gaius*, iv., 31.

§ *Dig. I., 10, 3, 2.*

|| *Cod. viii., 10.* These building laws (chiefly promulgated by the Emperor Zeno) were commented on by Dirksen in the *Transactions of the Berlin Academy* for 1844

pillars. A sea-view was not to be obstructed for a hundred feet in any direction.* A house built on arable land or in a vineyard must be two bowshots, or, if space would not allow of two, at least one bowshot from the bounds of a neighbour's land.† Uncovered tops of houses or open roofs (*solaria*) must be ten feet at least from the house of a neighbour.‡ Burials within the city walls were forbidden at Rome by the XII Tables, in all cities by a Constitution of Diocletian and Maximian in 290.§ A corpse once buried could not be disinterred without the express authority of the Emperor.|| The cultivation and holding of land was subject to some peculiar restrictions. A person who owned good land was bound to cultivate a certain amount of poor land with it.¶ *Agri limitanei* or *limitrophi* cultivated by veterans, were not liable to public burdens, and could not be held by others than veterans.** Except where thus specially exempted, land was subject to the land-tax and other public imposts, the generic name of which was *vectigalia*. One of them, the *navalis functio*,†† bears a striking likeness to the English ship-money. Others of some interest were the *angaria*, an enforced supply of public post-horses on high roads, and the *parangaria*, a similar supply on other roads. From these no Ecclesiastical or Civil dignity was sufficient to excuse.‡‡ There was also a legal liability on the part of owners of property (binding even royalty itself), to bake bread for soldiers,§§ and to provide them with billets, or pay a composition (*epidemeticum*) in lieu.¶¶ A Constitution of Constantius and Constans descended to the detail of enacting that a soldier so billeted could not demand a bath from his host.¶¶¶

* *Nov. cxlv.*

† *Leon. Const. lxxi.*

‡ *Id. cxiii.*

§ *Cod. iii., 44, 12.*

|| *Cod. iii., 44, 14.*

¶ *Cod. xi., 58, 10.*

** *Cod. xi., 59.*

†† *Cod. xi., 58, 15.*

‡‡ *Cod. xii., 51, 21.* A similar duty existed, as Herodotus tells us (viii., 98), in Persia, and is still known in Norway and some other countries.

§§ *Cod. xii., 39.*

¶¶ *Cod. xii., 41.*

¶¶¶ *Cod. xii., 41, 6.*

Dignities and Professions.—From the time of Diocletian (the first Emperor to assume the diadem) the position of the Emperor and his Court became more and more subject to definition in regard to outward etiquette. The ceremonial law to which the Court of Constantinople was subject became in course of time exceedingly rigorous, especially in the different modes of conduct prescribed for the great Church festivals. An enormous mass of very unprofitable information on the subject is contained in Byzantine writers subsequent to Justinian, especially Constantinus Porphyrogenitus* and Codinus. *Curopalates*.† There is a large amount of very minute legislation (especially in the twelfth book of the Code) as to other dignities, such as the titles of *clarissimus*, *illustris*, and *spectabilis*, some merely honourable, others nominally honourable, but in reality with the burden far exceeding the honour, such as that of *tutor*.‡ In the case of *decuriones*, this was so much so that

* *De Cærimoniis Aulae Byzantinæ* (probably written about 950). According to this author, who, as Emperor, was the highest authority possible, the very acclamations in the Hippodrome were prescribed, the people having to cry 'Αγία Θεοτόκε at a given time, i. 71. One of the ceremonies, that of triumph over an enemy, ii., 20, could have had but a theoretical existence in the later Eastern Empire. [It might well have been in its vigour, however, in the 10th and 11th centuries.—ED.]

† *De Officiis Palatii Constantinopolitanus*. The author is said to have survived the fall of Constantinople. The series of rules used at Court was called the *Canon*. The Emperor's eating and drinking, his joy and grief, were all guided by this inexorable *Canon*. It contained also very minute rules as to dress, e.g., the Emperor wore at dinner a dress called the *ganatsa*, his nobles the *lapatsa*, the Great Domestic as a distinction having one sleeve of the *lapatsa* tied with a *cingulum*, c. vii.

‡ The exemptions from serving as *tutor* are very minutely stated in *Dig.* xxvii., 1, 6, 2, as far as regards professors of the liberal arts, e.g., in the smaller cities five medical men were exempt, in the larger seven. No limit was set in the case of philosophers, on account of their rarity, *Id.*, 7. It is interesting to note that the Law was thus fixed by the Philosopher-Emperor Antoninus Pius.

to be made a member of a *curia* was sometimes a punishment, and in order to prevent the complete decay of the *curiae* Theodosius and Valentinian in 443 made membership of a *curia* a means of legitimating natural children.* Service as a *decurio* and as *defensor civitatis* was compulsory,† and in the Theodosian Code the *curialis* could not leave his city.‡ Immunity from service was granted as a special privilege to veterans, medical men, and civil servants of various degrees (such as *stationarii*, *curiosi*, and others), and even to athletes who had been victors in three competitions.§ Pork-butchers and feeders of swine were also privileged from office;¶ that was, no doubt, on the ground that they were to a certain extent public servants, doles of pork being distributed free to the poorer citizens. On the other hand, *infames*, Jews, Samaritans, and Montanists were considered good enough for the undesirable dignity of *decurio*.|| The position of the soldier in the Roman Empire was nominally higher than that occupied by the conscript of Continental Europe, or the English soldier whose relation to the State is one of voluntary contract. Service in the Roman army was regarded as a privilege, and was theoretically open only to free Roman citizens of good character.** A shopkeeper could not serve; he must choose between the life of a soldier and the life of a tradesman, the two were incom-

* *Cod.* v., 27, 3. † *Dig.* l., 2; *Nov.* xv., 1. ‡ *Cod. Theod.* xii., 18, 1.

§ *Cod.* x., 53. ¶ *Cod.* xi., 16. || *Cod. Theod.* xii., 18, 1.

** *Militiae dignitas* is a term used (according to one reading) in the rubric of *Cod.* xii., 34. A moral offence, such as insulting language to a parent, was a disqualification for service, *Dig.* xxxvii., 15, 1, 3. As the main privilege of military service consisted in the defence of the sacred person of the Emperor, it is not surprising to find that in the time of Justinian considerable military jurisdiction was lodged with the Emperor's confidential secretary, the *Comes rerum privatarum*, *Cod.* xii., 34, 8. Slaves were sometimes enlisted in cases of emergency.

patible.* A *colonus* could not voluntarily enlist, but was liable to serve when his lord was called on to furnish recruits.† Admission to the medical and legal professions was regulated by law, and was not in the power of quasi-private associations as in England. The number of professors and teachers was limited. The *procænium* of the Digest is addressed to the eight authorised professors of law. The number of medical men seems to have been fixed by the Emperor at Rome and Constantinople,‡ by the *Præses Provinciæ* elsewhere.§ The *Præses* also fixed the fees of provincial lawyers and medical men.|| Teachers of rhetoric were similarly limited, and their number originally confined to thirteen for Roman Literature, fifteen for Greek. Theodosius and Valentinian added one for Philosophy and two for Law.¶ Any one wearing the habit of a philosopher without authority was liable to banishment.** One or two other matters falling under this head may be very briefly noticed. Tutors and curators and their sons could not marry a *pupilla* while she was under guardianship.†† *Præsides provinciæ* and other high officials and their sons could not marry during their office any woman domiciled in their jurisdiction.†††

Trade and Industry.—The policy of the Usury Laws, recognised by the XII Tables, existed in full vigour to the latest stage of Roman Law, whence no doubt it was adopted in so many modern systems. §§ An attempt was made by the *Lex Genucia*, B.C. 340, to prohibit interest on loans altogether, but it was almost an economical necessity

* *Cod.* xii., 35.

† *Cod.* xi., 47, 18.

‡ *Cod.* x., 52.

§ *Dig.* I., 9, 1.

|| *Dig.* I., 13.

¶ *Cod.* xi., 18, 1.

** *Cod.* x., 52, 8.

†† *Dig.* xxiiii., 2, 67, 3.

††† *Cod.* v., 4, 6.

§§ The exaction of interest was in theory an *inelegantia*. It broke the symmetry of the *mutuum*, because by it *aliquid lucri exigitur ultra sortem ratione mutui*, to use the words of Pope Benedict XIV. in his *Epitome Doctrinæ Moralis et Canonicae*, s.v. *Usura*.

that such an attempt should be unsuccessful. Interest was fixed in the time of Justinian at a sum varying according to the character of the loan, but in general not exceeding twelve per cent. per annum (*centesimæ usuræ*) the limit for maritime loans (*pecunia trajectitia*). Here again the influence of dignity is seen, for a loan to an *illustris* could not be charged with interest at more than four per cent.* Other laws falling under this head may be divided into those affecting tradesmen and those affecting labourers. Some of the former class contain remarkable provisions. As a rule, trade could only be carried on by persons not noble by birth, or by civil or military employment.† Eleven hundred workshops (*officinæ*) belonging to the Basilica of St. Sophia were exempt from taxation.‡ The right of conducting funerals was reserved to these privileged *officinæ*, probably survivals of the Republican *collegia funeraticia*. They were bound to render their services without fee, but they might accept a voluntary gift not exceeding a sum which varied according as the funeral was within or without the city walls.§

Certain commodities were forbidden to be sold by private persons, among others, textile fabrics of the Imperial purple, silk, and corn from the public lands or for the use of the army.|| Certain others might not be exported; the sale of provisions and arms to foreigners was a capital crime.¶ Gold fell within the same prohibition, with the addition somewhat inconsistent with the comity of nations, as now understood, that if such gold were found in a foreigner's possession it might be taken from him *subtili*

* *Cod.* iv., 32, 26, 1. Justinian at a later date reduced the maritime interest from twelve to ten or eight per cent. according to circumstances. This was effected by *Nov.* cxi., but this Novel was repealed in the following year by *Nov.* cx., when presumably the former rate was restored.

† *Cod.* iv., 63, 3.

‡ *Novv.* xliii. and lix.

§ *Ib.*

|| *Cod.* iv., 40.

¶ *Ib.*, 41.

*ingenio.** Monopolies were forbidden by a Constitution of Zeno in 483.† Prices were occasionally fixed, e.g., that of silver at five *solidi* a pound,‡ and that of the military *chlamys* at one *solidus*,§ both by Constitutions of Arcadius and Honorius.

The manufacture of arms,|| of purple,¶ of gold ornaments, ** and even of sausages,†† was the object of Imperial Constitutions. The Law also dealt with frauds caused by costermongers (*olitores*) pretending to sell one kind of vegetable and really supplying another,†† and with sturdy beggars (*mendicantes validi*).§§ In some cases the latter were reduced to the position of *coloni*. The relation of the labourer to the State was of smaller importance in the Roman Empire than in modern States. His position was to a great extent fixed for him, partly because most of the manual labour must have been done by slaves and *coloni*, partly because free operatives were to a great extent bound to follow their hereditary handicraft. This was especially the case with members of the *collegium* or fire brigade.||| One of the Licinian laws, as early as B.C. 367, attempted to protect the interest of the non-servile labourer by enacting that every tenant of arable land was to employ on it as much free as slave labour. The position of the *coloni* is an interesting one, as it forms the link between the ancient forced and the modern free labour. Their rent was deter-

* *Cod.* lxxiii., 2.

† *Cod.* iv., 59.

‡ *Cod.* x., 76.

§ *Cod.* xii., 40, 3.

|| *Nov.* lxxxii. Government smiths were forbidden to sell arms to private persons, and no private person could manufacture arms for himself, *Ib.* Nor could he remove arms without the Imperial licence, *Cod.* xi., 46.

¶ *Leon. Const.* lxxx.

** *Id.* lxxxii.

†† *Id.* lvi. They were not to be made of blood. They must be genuine sausages and not black puddings. The *ἀλαντοπώλης* of Aristophanes would no doubt have been guilty of a police offence had he lived under Leo the Philosopher.

††† *Nov.* ixiv.

§§ *Cod.* xi., 25.

||| *Cod. Theod.* xiv., 7.

mined by custom.* They were not free to enter into a contract with any one, but were tied to the land, and if one of them ran away, any one who harboured him was liable to a fine.† In fact, the situation of the *colonus* was not unlike that attributed by Coke to the copyholder before he had completely emerged from the status of villenage.‡ The *colonatus* was not the only example of rights as between parties being fixed by custom rather than contract. In the Novels there is a provision that custom is to be observed in prices and wages in both trade and agriculture.§

Contract.—The position of the *colonus* is an example of interference with the contract of labour. That of the *emphyteuta* is an example of interference with the contract of tenancy. The rent could not be increased by the owner.|| If the *emphyteusis* was of church lands, not more than one-sixth of the rent could be remitted.¶ Alienation by the *emphyteuta* must be with the consent of the owner, and with certain prescribed formalities,** and could not, if of church lands, be made to a heretic.†† As a rule, writing was not necessary for contracts in Roman Law, nor were stamps known. But in certain cases contracts sealed in the presence of a notary were of superior efficacy, e.g., a contract of hypothec so sealed gave priority over a simple hypothec, as in fact at a later date did a contract of hypothec signed by three witnesses.‡‡ The contracts of bankers were regulated by special rules peculiar to themselves. Soldiers, *filiifamilias*,

* *Cod.* xi., 49, 1.

† *Cod. Theod.* v., 9, 1. The fine is not imposed in the corresponding article of the Code of Justinian, only the return of the fugitive enjoined, *Cod. xi.*, 47, 8.

‡ The mournful epigram of Martial (xi., 14) is strong evidence of the unhappy lot of the *colonus*—

Heredes, nolite brevem sepelire colonum,

Nam terra est illi quantulacumque gravis.

§ *Nov.* cxxii.

|| *Cod.* xi., 70, 3.

¶ *Nov.* cxxx., 1.

** *Cod.* iv., 66, 3.

†† *Nov.* cxxxii., 14.

‡‡ *Nov.* lxxiii., 1.

and others liable to be the victims of fraud were protected, as, for instance, by the *Sc. Macedonianum* (of the reign of Claudius or Vespasian), which refused a right of action on a contract entered into between a money-lender and a *filiusfamilias*.*

• A Constitution of Constantine, in 321, forbade any trade or occupation to be pursued on Sunday except that of agriculture.† Nearly six centuries later the exception was revoked by Leo.‡ The only legal business allowed to be done in the Easter fortnight was emancipation and manumission, and such contracts and compromises as did not require the intervention of a Court of Justice.§ But pirates could be tortured even on Easter Day, the divine pardon being hoped for where the safety of society was thus assured.||

The Church.—Tolerance was a political growth of later date than the Roman Empire. Heresy was a disability, but a distinction was drawn between heretics of different kinds. The Pagan, the Jew, and the Manichean were subject to disabilities not all of the same nature, and regulated by the most minute legislation, of which only one or two examples can be given here. Thus, heretic fathers were compelled to leave orthodox children, whose conduct had been good, as much as they would have taken *ab intestato*.¶ They were also compelled to endow orthodox daughters and marry them to the orthodox.** A Jew or Pagan could not have a Christian slave.††

The privileges of the Church were very numerous, as a glance at the provisions of *Nov. cxxxii.* (one among many others of a similar nature) will show. Its privilege in the case of *emphyteusis* has already been mentioned; it was also favoured by the law of prescription and in many other

* *Dig. xiv.*, 6, 1.

† *Cod. iii.*, 12, 3.

‡ *Leon. Const. liv.*

§ *Cod. iii.*, 12, 8.

|| *Ib.*, 10.

¶ *Cod. i.*, 5, 13.

** *Ib.*, 19.

†† *Cod. i.*, 3, 56, 3.

ways, for instance, the immunity of the clergy from the ordinary jurisdiction of the Courts.

Sumptuary Laws.—The XII Tables contain a considerable amount of sumptuary legislation, especially as to funerals. Among the more interesting provisions is that forbidding excessive mourning by women and that limiting the attendants at a funeral to three mourners wearing *ricinia* (woollen veils), one wearing a purple tunic, and ten flute-players.* A similar principle is found in the latest stage of the Law, Justinian limiting the attendants to eight singing women and three *acoluthi*.† In the *Sententiae* of Paulus‡ the time of mourning for each relation was fixed, the period for a father or a child over the age of six being twelve months, for a husband ten. Sumptuary laws dealing with other matters are found very early in the history of the Republic, and continued to be enacted down to the latest period of the Byzantine Empire. The earliest after the XII Tables appears to be the *Lex Oppia* (B.C. 215, repealed 235), dealing with women's dress and jewellery, the weight of gold being limited to half an ounce. Others were the *Orchia*, the *Fannia*, the *Juliae*, &c. The *Fannia* (B.C. 161) was one of the most curious. It provided *inter alia* that only one fowl should be served at dinner, and that was not to be fattened for the purpose. The early Emperors promulgated numerous sumptuary regulations which have been preserved by Tacitus, Suetonius, Dion Cassius, and others.§ The sumptuary provisions contained in the *Corpus Juris* are very numerous. They may be divided into those relating to dress and to expenditure. In the first division, the ring and the *cingulum* or belt were important as denoting rank. The privilege of

* These provisions are included under the head of sacred law in Table X.

† Nov. lxx., 4, 1.

‡ i. 21, 13.

§ For these early sumptuary laws, see Smith's *Dict. of Antiquities*, s. v. *Sumptuarie Leges*.

wearing gold rings was confined to the freeborn, and until the time of Justinian could only be conferred on freedmen by special grant of the Emperor. Justinian, however, granted the right to all freedmen as a class.* The right might also be enjoyed by women.† The *cingulum* was a mark of honour, in soldiers it perhaps corresponded to the modern stripes.‡ Deprivation of the *cingulum* was a common mode of punishment, especially of magistrates.§. No pearls or diamonds were allowed to be worn on saddles or girths of horses.|| There were very strict rules as to one class encroaching on the dress of another. Imitation of the dress of the Imperial family (except in ladies' jewellery and in rings) was forbidden under penalty of 100 *librae*.¶ It was enacted by Justinian that for any one not entitled to do so to wear the dress of a monk or nun ** or of a philosopher †† rendered the offender liable to a penalty. Three centuries later than Justinian an edict of Theophilus ordered all Romans to wear their hair cropped short.‡‡ Michael VI., in the eleventh century, commanded that the heads of the citizens of Constantinople should no longer be covered with cotton or linen caps without lines, but that the caps should be inwoven with purple lines. §§ As to expenditure, it is to be noted that all those who had reached a certain rank (*honorati*) in the military or civil service were entitled to ride in chariots within the city.||| A Consul who had a wife or mother could spend more than if he had not, ¶¶ but in both cases his largess was limited to seven spectacles given during his year of office.***

* *Nov. lxxviii.*, 1.

† *Dig. xl.*, 10, 4.

‡ See *Cod. xii.*, 34, 5, where it is said that a soldier might deserve two or three *cingula*.

§ *Nov. cxxiii.*, 8; *cxxxiv.*, 3.

|| *Cod. xi.*, 11.

¶ *Id.*

** *Cod. i.*, 4, 4.

†† *Cod. x.*, 52, 8.

†† Finlay, *Byzantine Empire*, i., 180.

§§ *Cedrenus*, ii., 614

||| *Cod. xi.*, 19.

¶¶ *Nov. cv.*, 2.

*** *Ib.*, 1.

Amusements.—The great Roman amusement was the theatre, and there is a considerable amount of both restraining and enabling legislation* on the subject. This will not appear surprising when it is considered that the theatrical legislation of the early Christian Emperors was a compromise between Christian asceticism and the old national enthusiasm for public spectacles. An example of restrictive legislation has been given in the preceding paragraph. Other examples were the laws forbidding theatrical performances on Sundays and holy days,* and those affecting actors as a class with *infamia*,† obliging them to wear a distinctive dress, and forbidding their statues to be placed in the public streets.‡ The *Lex Roscia* (B.C. 67) and the *Lex Julia* (B.C. 63) fixed the position of knights and spendthrifts in the theatre. In A.D. 27, in consequence of a great accident, a *Senatus Consultum* was passed forbidding an amphitheatre to be built except on a foundation of approved security. Censorship of the theatre existed to some extent, at least at the time of Horace,§ though it is uncertain how far such censorship was preserved at a later period. Probably the ordinary law was found sufficient to prevent the exhibition of anything offensive to the head of the State on political grounds. On moral grounds objection was probably seldom made. The frightful debasement of the theatre is obvious from what is said by Juvenal, Martial, and Procopius. The time-honoured spectacle of gladiatorial combats was finally

* *Cod.* iii., 12, 1. † This was a provision of the Edict, *Dig.* iii., 2, 1.

‡ *Cod.* xi., 40, 4.

§ Sp. Mæcius Tarpa is twice mentioned by Horace, *Sat.* i., 10, 39; A.P. 386. Tarpa was engaged by Pompeius to select plays for representation in B.C. 55 (*Cicero, ad Fam.*, vii., 1) and seems to have been retained as a dramatic censor by Augustus. From the line in the *Satires* *Quæ neque in æde sonent certantia judice Tarpa* it would appear that the office analogous to our Lord Chamberlain's office at Rome was a temple.

abolished by Constantine in 325.* The right to give them had been previously limited by a *Senatus Consultum* of A.D. 27 to persons with an income of at least 400,000 sesterces.† Examples of the enabling or favourable policy with regard to the drama are to be found in the opinion of Macer that a private person might build a theatre or amphitheatre without the permission of the Emperor, especially if it were in emulation of another city,‡ and in a Constitution of Valens and Valentinian allowing the exhibition of private spectacles in a theatre.§ It may be worth noticing in this place that one of the grounds for which a husband might divorce his wife, under the legislation of Justinian, was her going to a theatre without his knowledge.|| There is little mention of any other amusement in the *Corpus Juris*. Lion-hunting was free to all.¶ The May-game and the dice were regulated by special laws. The former (*maiuma*) was allowed by Arcadius and Honorius as long as decency was observed.** Gambling with dice (the *vetita legibus alea* of Horace) was a subject treated in the Edict, the *Prætor* refusing an action to any householder assaulted by one who had lost his money at dice in the former's house.†† A Constitution of Justinian forbade, under a penalty of ten *libræ*, all games of chance, with five exceptions, among which dice were not included. In the excepted games (*monobolon*, *contomonobolon*, *quintanus*, *contax sine fibula*, *perichyte*, *hippice*) the stakes were limited

* *Cod. xi.*, 43, a Constitution much reduced from its original dimensions as given in *Cod. Theod.* xv., 12. The Constitution of 325 appears to have made these combats only theoretically illegal, and they did not become practically obsolete until after the murder of Telemachus in 404. By the time of Justinian they had been so long obsolete that it was unnecessary to set forth the law except in the briefest terms.

† *Tacitus*, *Ann.* iv., 63.

‡ *Dig. 1.*, 10, 3.

§ *Cod. xi.*, 40.

|| *Nov.* 117.

¶ *Cod. xi.*, 44.

** *Cod. xi.*, 45. It consisted in an annual visit of the Romans to Ostia, there to disport themselves in the sea.

†† *Dig. xi.*, 5 1.

to a *solidus*. The winner at dice had no legal remedy for his winnings, and the loser could sue the winner or his heirs for the sum lost, even after the ordinary period of limitation.*

JAMES WILLIAMS.

II.—CONSTITUTIONAL ASPECTS OF HOME RULE AND IMPERIAL FEDERATION.

THERE is an old proverb about giving a dog a bad name, and perhaps Home Rule, as it is called, is no bad instance of the consequences which frequently ensue. For the expression is capable of an infinite variety of meanings, applications, and constructions, and scarcely any two persons use it in exactly the same sense. Even within the ranks of the so-called Home Rule party in the House of Commons, there seem to be certain *nuances* indicative of differences of opinion, and outside the House the variations are almost endless. It has long been the custom to associate the name with one particular phase of it, that which concerns Ireland. But signs are not wanting that the question is one of far wider, or, as the phrase goes, more Imperial concern. Having got it into our heads that somehow or other we are an Empire, we talk about Imperial interests, the Imperial Parliament, &c., and even about something which is called, by some odd mental process which we have not yet succeeded in fathoming, Imperial Federation.

It may perhaps be conceded that Home Rule, whatever it may mean, and that is a subject of much doubt and

* *Cod.* iii., 45. For further information on the subject of this article the reader is referred to Professor Friedländer's *Darstellung aus der Sittengeschichte Roms* (Leipzig. 1869. 2nd Ed., 1888).

difficulty, is the contradictory of this Imperialism of which we also hear so much. Each is asserted by its supporters to be the supreme necessity of the day in British Politics. If any difference may be traced between the two, in the matter of self-assertion, the greater amount of violence seems to lie at the door of some of the supporters of Home Rule. Yet it is difficult always to distinguish clearly between the Imperialistic Home Rule, if we may give it such a name, of our valued friend, Mr. Alexander Robertson, so as to be able to say at once, "This is the sound Constitutional, Imperialistic, Home Rule," and the various schemes which have been put forward as the only panacea for Irish detestation of English rule, or for the grievances of Scotland and the Tithe-pig agitation of "gallant Wales." Will any of these schemes really succeed in giving Peace to Ireland, or satisfaction to Scotland and Wales? Or will they be only the beginning of the end as regards the Union? Of course we know that Conservative or Imperialistic Home Rulers will be scandalised at the mere suggestion that their pet project can possibly have any disintegrating tendency. They do not intend it so, we grant, but can they answer for the movement which they are helping to initiate remaining under their control? We doubt this much, and we are not of opinion that all the suggestions even of so-called Conservative Home Rulers are within the limits of the Constitution.

"We must have decentralization," says Mr. Robertson,* and some form of Home Rule for England, Scotland, and Ireland." This postulate being granted, for argument's sake at any rate, it is obviously necessary to enquire what form of Home Rule is supposed to be the best, or the best available at the present time.

* *Political Addresses on Home, Irish, and Colonial Affairs, &c.* By ALEXANDER ROBERTSON, M.A., Barrister-at-Law. Dundee. Winter and Duncan. 1889.

"Possibly," Mr. Robertson suggests, "the solution will be found in having one Legislative Assembly for each country, and one Imperial Parliament for the Empire" (*op. cit.*, p. 89); yet a little further on (p. 105), Mr. Robertson says that he is "in favour of three separate and independent national Parliaments for England, Scotland, and Ireland, and of an Imperial Parliament over all, and of each Parliament being composed of two Houses rather than of one House." There have been times when Mr. Robertson has appeared to be a champion of the One Chamber system. We are glad to find him saying now that "in a democratic country such as ours," he is in favour of two Houses, "in order to provide safeguards against thoughtless, dangerous, or sudden modifications in our constitutional form of Government." This is a danger which perhaps we are apt to underrate, but it is nevertheless a real one, perhaps more real than we think. We often speak with contempt of a "Paper Constitution," and no doubt a Paper Constitution may be abrogated quite against the real will of the People. But there is at least this to be said in its favour that, while it lasts, it is a Document, which all the world can read, and its destruction must be patent to everybody, aliens and subjects alike.

King Bomba, of Neapolitan Paper Constitution fame, no doubt gave a Paper Constitution, and then, suddenly getting the upper hand, imprisoned or drove into exile those of his subjects who had been credulous enough to take office under it. But these doings of Bomba were made patent to Europe by the very fact of the Constitution having been put on record on paper, so that all the world could gauge the depth of the King's insincerity and appreciate his character at its true value.

Our Constitution, on the other hand, is so largely an unwritten one that, as Mr. Robertson justly remarks (*op. cit.*, p. 105), "there exist no precautions against constitutional

changes, unless by means of the House of Lords, or the now obsolete veto of the Crown. Vast changes might be made by wire-pullers, for party purposes, for power or office, without even consulting the Parliamentary electors of the country.' In the American Constitution, he reminds us, special and careful precautions are taken against sudden Constitutional changes. And, he might have added, the Supreme Court of the United States is always at hand, ready to pronounce, according to the power vested in it by the Constitution, on the Constitutionality of any Acts, whether of the State Legislatures or of Congress. This is, in fact, making of Interpretation a Constitutional safeguard. It may be a question whether the High Court of Justice in this country, and in Ireland, and the Court of Session in Scotland, might not usefully be entrusted with similar powers. We are not sure, indeed, that such a power may not exist in the Court of Session, which is known to possess, and on occasion to exercise, the power to declare a given Scottish Act of Parliament obsolete by desuetude. Where very old statutes have been cited in England, the Courts have gone a considerable length in the same direction, though they may not claim to have done exactly the same thing as the Scottish Courts are acknowledged to be able to do. It is of course far easier to exercise such a power in the case of a written than of an unwritten Constitution, and the comparative frequency with which the Supreme Court, U.S.A., passes upon such grave questions as the Constitutionality of a given Act arises not from any defect in the Federal or State Constitutions, but from the circumstance of those Constitutions being written documents. It is not proposed here to discuss the relative merits of the two systems. And, indeed, such a discussion might seem to be purely Academic. Incidentally, however, we could scarcely avoid some allusion to it in connection with the present

subject, at least from our point of view, which is mainly concerned with its Constitutional aspects, avoiding, as far as may be, all reference to party politics.

There are certain points of contact between the Imperialistic and Home Rule schemes which might not at first sight seem to exist. Mr. Robertson's idea, for instance, of Imperial Federation is moulded, we gather, upon the Federal Union which constitutes the United States of America. And we suppose that Mr. Parnell would, for the present at any rate, accept such a position as satisfying the reasonable demands of those on whose behalf he claims to be acting. As regards the United Kingdom proper, that is to say, England, Scotland, and Ireland, a Federal Union, if it were to be established, or if it were supposed not to be what is actually in existence, would unquestionably be a Union of Sovereign States. But as regards the various Colonies and Dependencies of the United Kingdom there would obviously not be the same equality, and their Representatives in the proposed or suggested "Imperial Senate" would be Representatives not of Sovereign States in Union, but of certain anomalous bodies which, in Theory at least, it would be difficult to classify. This appears to us to be a fair objection to the Imperial Federation idea. American writers take it against that form of permissive and limited Federation, if we may so speak, which has been established by the British North America Act for the British Colonies now styled the Dominion of Canada. These objections were touched upon in the last number of this *Review*,* to which we may refer readers interested in the subject. Some of the Colonies whose representative Senators would sit in Mr. Robertson's Representative Senate, would not even be

* *Law Magazine and Review*, No. CCLXXIII., for August, 1889. Art. *Federal Constitutions in U.S.A. and British Colonies*, I., *U.S.A. and Canada*. II.

the Senators for a Dominion, or for a Province of a Dominion, for we do not exactly know how we would arrange those details. • They might be Senators for a Crown Colony, an Oasis of Despotism in the Desert of Constitutionalism. What sort of a place and weight would be theirs? How to reconcile the existence of Crown Colonies with a Constitutional Monarchy, or veiled Republic, is one of those feats which it passes our limited powers to perform, and we will therefore for the present respectfully leave it on one side, as a subject for admiring wonderment. Mr. Robertson seems calmly to cut the knot of this particular difficulty by incidentally speaking (*op. cit.*, p. 135) of a future "Imperial Parliament" for the Three Kingdoms for all matters of Imperial interest, and on such a basis as would admit Representatives in the Imperial Parliament to be chosen from all the legislatively free, independent colonies and independencies [this is not a joke, we believe, but only a printer's error], of the Empire." And he speaks of this as a Confederation of the British Empire. But, if we understand him rightly, it will be a Confederation in which the Crown Colonies will have no part, and we have ourselves pointed out the difficulties which seem to surround their admission. Therefore, after all, it will be an imperfect sort of Confederation, and in no case, as far as we can understand, at least as regards the Colonies and Dependencies, can it be a Federation of Sovereign States. As regards those proposed Constituent members it could only be what writers in the United States practically call the Dominion of Canada, viz., a bogus Confederation. Is that worth establishing, and if established, would it help us much towards a real solution of the difficult problems in Politics which are daily more forcibly appealing to us for a solution? We doubt it, just as we doubt the aims of many who are either calling upon us for a solution of these problems or offering us their ready-made

solutions. Mr. Robertson, we feel, is in earnest, and therefore we shall not hesitate to take up his suggestions, whenever they seem *ad rem* at any particular point in the controversy, which is one likely to last for some time to come.

In Scotland, there appears to be a possibly considerable but evidently rather vague sentiment growing up in favour of something which is called Home Rule, under the patronage, or at least the fostering care, of a Political society styled the "Scottish Home Rule Association." We feel obliged to say that the sentiment is a vague one from the character of some of the points which (as we learn from the *Dundee Advertiser*, 24th September, 1889) were to be brought before a meeting announced to be held under the auspices of the Association in Dundee, 25th September last. The various "branches and Political Associations affiliated were to be requested to consider and report to the Executive Committee their opinions" on points of such very varied character as the question "whether the Scottish Legislature should sit in the ancient Parliament House of Scotland," and the really deep problem in Political Science "whether the Scottish Legislature should consist of one or two Chambers."

This question concerning the Legislature proposed to be restored to Scotland appears to us not to be an open one, if the word Legislature is to be taken in any other than a non-natural sense. The Scottish Legislature exists as a part of the Legislature of the United Kingdom, and it is Bi-cameral. There is a Scottish House of Lords, by representation, in the House of Lords of the United Kingdom, and there is a Scottish House of Commons, by representation, in the House of Commons of the United Kingdom. If it is proposed to re-establish a Scottish Legislature sitting in its historical seat, *i.e.*, in Scotland, it appears to us that of such Legislature the Scottish Peerage, in its integrity, must form one Chamber. It could still be represented at Westminster, for what are called Imperial

purposes, by the existing sixteen Representative Peers, or their successors, and the Scottish House of Commons could still be represented at Westminster, for similar purposes, by representative Commissioners for Shires and Burghs.

Exactly the same argument applies, in our mind, to the case of Ireland. There is an Irish Peerage, the whole of which would have right, we submit, to seats in the House of Lords of a revived Irish Legislature. They could still be represented in the House of Lords of the United Kingdom, and the Knights for Shires and Burgesses for Boroughs in Ireland could similarly be represented in the House of Commons at St. Stephen's. So at least, it seems to us, and this is what we believe to be the logical reading of the word Legislature, when it is proposed to re-establish National Legislatures for Scotland and Ireland. We are not here discussing the wisdom or the necessity of the step, but only its Constitutional aspects, as they appear to us. We therefore do not feel it needful to discuss, with the Scottish Home Rule Association, whether there should be one Chamber or two in the suggested "Scottish Legislature," and still less to answer the question propounded by the Association, "If of two Chambers, who should elect or appoint the Senate or Upper House, and how should its membership be constituted?" We should hold that this question is already answered by the Constitution of Scotland, no less than by that of the United Kingdom, and that the Upper House is already in existence, and has only to take its Constitutional place in the revived Legislature of Scotland, and the same applies, *mutatis mutandis*, to Ireland.

The Scottish Home Rule Association speak in their *Questionnaire*,—we do not call it a Programme because it is cast in the form of a series of questions, to which they are themselves seeking an answer,—of a "Scottish Premier," whom they assume to be appointed "as the Prime Minister now is, and to select his own ministry." We do not know

whether the Association desire to exalt the recently revived Scottish Secretary into a Scottish Premier, or whether they expect the Secretary to be a Member of the future Scottish Premier's Ministry. And we do not know whether they have considered how far it is technically correct to speak of the Premier as being "appointed" at all, under our present rather complicated and unscientific happy-go-lucky sort of no system. It would be easier to assert that there is no such person as the "Premier" in existence, than to define how he is "appointed." This sort of thing may work in an old-established political machine among illogical people like the English, but it may be doubted whether it could be reproduced anywhere, least of all perhaps among a somewhat logic-chopping people like the Scots. To the question "What taxes should be imposed by the Imperial Parliament, and what by the Scottish Legislature?" Mr. Robertson would seem to have his answer ready where he says (*op. cit.*, p. 114), "Whence taxation sprung there should be the power of spending, or of giving powers to spend: and that either by the persons who are taxed, or by their representatives." To the question whether the Scottish Legislature [of the future] "ought to receive specific powers or to be empowered generally to exercise all powers not specially reserved by the Imperial Parliament," the answer, we take it, practically depends on the nature and extent of the devolution of powers involved in the particular form of Home Rule which, *ex hypothesi*, is to be established in Scotland. The *Questionnaire* assumes that, "speaking generally, interests that are common to the United Kingdom, together with the oversight of the British Colonies and dependencies, and foreign affairs, and similar matters [it is to be hoped that so dangerously vague a phrase will not find its way into the future Home Rule Bill for Scotland], should remain under the exclusive control of the Imperial Government, while all questions affecting the social well-

being of Scotland,—the land, education, the Church, the liquor laws [there seems to be a delicate vein of irony here, in the close association of the Church and the liquor laws, but it is possibly unintentional], &c. [*et cetera*, again, is a very vague Home Rule *formula*], should be the province of the Scottish Legislature." Subject to the exceptions which must necessarily be taken to the loose drafting of these questions, they seem intended to embody the idea of a National Legislature dealing with National subjects, alongside of a Federal or Imperial Legislature, or whatever it may be most proper to call it, dealing with Foreign Affairs and Colonial interests. This would seem to involve the resumption, *simpliciter*, by the revived Scottish and Irish Legislatures of the powers which they respectively possessed before the Union, on the hypothesis which alone seems to us to be the Constitutional revival of these Legislatures, that they shall be Bi-cameral, and consist of the Lords and Commons of Scotland and Ireland respectively.

On the point whether the veto to any given Bill passed by the proposed Scottish Legislature ought to be applicable "solely on account of the Bill being *ultra vires*, or also on account of its being purely objectionable on grounds of public policy," the utility of powers such as the Supreme Court, U.S.A., possesses seems to become obvious. If the Court of Session, for example, were to give judgment that a given Bill was *ultra vires*, the Royal Assent would naturally be withheld. Practically, there would be no use in giving it, but the death blow to the attempted unconstitutional statute would have been dealt by an impartial body, and no *odium* could justly fall upon the Crown for accepting the judgment of the Legal interpreter of the Constitution. The point of *boni mores* is one which would also better come up for settlement before such a Tribunal than before the Crown in the personal form in which the giving or withholding of the Royal Assent is necessarily cast.

Large measures of what is called Local Self Government have lately been conferred upon the 'English and Scottish Counties, and elaborate organisations, with corporate seals and paid officials, have been established under the imposing name of County Councils. Men of the Monkbarns type of mind hailed these Councils as a revival of the Shire-Moots of our Teutonic ancestors. We very much doubt whether one of these often invoked and not very widely understood people would recognise Lord Rosebery and Professor Stuart as their accustomed brethren in the Moot, though we do not say this in disparagement of the services which the so-called "Progressive" Members are rendering to the London County Council.

Extensions of County Administration of a similar character had long been in process of incubation for Scotland, and Mr. W. G. Black has dealt with that branch of the subject at considerable length in his interesting article in this *Review*,* so that we need not enter into it here.

We have watched with some interest the initiation of this movement, which, in Party language, might perhaps be called a leaf taken out of the "Progressive" party's programme by a Conservative Government. But we fail as yet to trace in it anything more than a pretext for raising the Rates, which are already in most districts pretty heavy, and for adding fresh fuel to Party bitterness. Absurd as it may seem, seats on the County Councils are, as a matter of fact, fought over on exactly the same Party grounds as seats in Parliament. There is no question of choosing the best Administrator, the man with local knowledge or an interest in the land or the trades of the neighbourhood to be represented. All the stock Party cries are raised, all the old Party weapons are trotted out, and members are returned to seats

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on this so-called revival of the Teutonic Shire-Moot not because they know or care two straws about the proper Administration of Local Self-Government, but because they have the repute of being ardent Gladstonians, or staunch Unionists, or perhaps so-called "Temperance" advocates. What hope does such a state of things inspire for the results of the extension of this system to Scotland, and perhaps before long to Ireland? To us it seems to hold out no hope of an extension of real, self-respecting, Local Self-Government. We used to hear that men would come forward for these Councils who had hitherto held aloof from Public life, and that the Councils would be valuable training schools for a Parliamentary career. For that which Mr. Robertson not unjustly, we fear, calls the great obstruction of the existing Parliamentary system, viz., loquacity, such Councils may be training schools. For waste of public time, which is such an ever recurring note of the existing House of Commons, they may be training schools, and not less so, it is to be feared, for that waste of public money which is only too characteristic of our so-called Parliamentary system, but which is really the result of the absence of any system at all. Would either Imperial Federation, or any feasible scheme of Home Rule supply the desired remedy for these evils? If they could, they would certainly be worth trial, within the limits which might be sufficient to test them. What either name precisely imports, we have not attempted to explain, because we do not profess to be able to explain it. But even Professor Freeman has said (*Universal Review* for July, 1889) that "with an effort" he can bear with a man who talks about Imperial Federation. We have made such an effort, and we have felt bound to do no less by the man who talks about Home Rule. What we recommend is not any supposed *panacea* for the ills of the Body Politic, but a careful study of Political Science.

III.—FOREIGN MARITIME LAWS: III. SPAIN.

CODE OF COMMERCE, BOOK III.

TITLE II.

Of Persons concerned in Maritime Commerce.

SECTION I.

Of Shipowners and Ship's Husbands.

ART. 586. The shipowner and ship's husband will be legally responsible for the acts of the captain and for obligations entered into by him, for repairing, fitting out and provisioning the ship, so long as the creditor shows the sum claimed has actually benefited the ship.

By ship's husband (*naviero*) is understood the person whose business it is to provision and represent the ship at her home port.

It should be observed that the onus of seeing that the ship has actually benefited by the expenditure, thrown by this Code on the creditor, is new, and unknown in other Codes.

B. Bk. II., 7, F. (1885), 216, G. 452-454 diff., H. 321, I. 491, R. 894, 918-920 diff.

587. The ship's husband will, moreover, be liable civilly to third parties, for compensation arising from the conduct of the captain in the care of goods laden on board the ship, but he can clear himself from this liability by abandoning the ship and all its appurtenances, and the freight earned during the voyage.

B. Bk. II., 7, F. (1885), 216, H. 349, diff., R. 918-920.

See Art. 590, *post*.

588. Neither the owner nor ship's husband are liable for obligations contracted by the captain if they are beyond the scope of the duty and authority incident to his position, or which have been conferred upon him by them.

Nevertheless if the sums claimed have inured to the benefit of the ship, the liability will remain with the owner or ship's husband.

B. Bk. II., 7, F. (1885), 216, G. 452, H. 231.

This Article apparently requires the creditor to ascertain not only that the ship has benefited by the expenditure (see note to Art. 586, *ante*), but also to find out what powers have been conferred on the master by the owners.

589. If two or more persons are co-owners of a merchant ship, the co-owners are deemed to be a partnership (*compañia*). This company is governed by the wishes of the majority of its members.

The majority is constituted by that of the members voting.

If there are only two members, a difference of opinion in such a case will be decided by the vote of the larger shareholder. If the shares are equal it will be decided by lot.

The person representing the smallest share is entitled to one vote, and proportionately the other shareholders to as many votes as they have shares equal to the least.

A whole ship cannot be detained, arrested, or taken in execution for the private debts of a part-owner; the person proceeding can only deal with the share which his debtor has in the ship, without putting any obstacle in the way of its being sailed.

B. Bk. II., 11, F. 220 (1885), 17, G. 456-458, H. 320, I. 495, N. 1, R.

The provision for escaping from the deadlock caused by a tie in voting is peculiar to Spain.

590. Co-owners of a ship are civilly liable, in proportion to their shares, for the consequences of the acts of the captain, in accordance with Art. 587.

Each co-owner can divest himself of this liability by abandoning, in the presence of a notary, the share in the ship belonging to him.

B. Bk. II., 7, F. (1885), 216, G. 452-454, 474, H. 321, I. 491, R. 918-920 diff.

591. All the co-owners remain liable in proportion to their respective shares for the expenses of repairs of the ship, and for other expenses incurred at the desire of the majority.

Similarly, they are responsible in the same proportion for the expenses of provisioning, fitting out, and furnishing the vessel with necessaries for the voyage.

B. Bk. II., 23, F. (1874), 233 (1885) 35, G. 486 diff., H. 323, 324, I. 495, 509, N. 6, 11, 106, R. 828 diff.

592. The will of the majority with respect to repairing, fitting out and provisioning the ship in her port of departure, binds the minority, unless the minority part-owners renounce their shares, which the other co-owners must take, the price of the shares ceded being previously judicially valued.

Further, the will of the majority will be binding on the minority as to the breaking-up of the co-ownership and sale of the ship.

The sale of the ship must be carried out by Public Auction, under the regulations of the Law of Civil Procedure, unless the co-owners unanimously agree on some other method, saving always the rights of pre-emption and withdrawal given by Art. 575.

B. Bk. II., 11, F. 220, G. 467, 468, diff. 473, H. 323-325, I. 495, 509, N. 5, 7, R. 825, 826, 828, diff. 829.

593. The owners of a ship have a preferential right to freight it over those who are not owners, the conditions and rate of freight being the same. If two or more of them compete for this right, the largest part-owner will have the preference; if they have equal shares it will be decided by lot.

This provision is peculiar to the Spanish Code.

594. The part-owners will choose an agent who will represent them in the capacity of ship's husband. The

nomination of a manager or ship's husband may be revoked at the discretion of the part-owners.

B. Bk. II., 10, G. 459, H. 326 diff., I., M.M.C. 53, 54, N. 5, R. 823,

595. The ship's husband, whether he is at the same time owner of the vessel, or only the manager on behalf of the owner, or of a society of co-owners, must be legally competent to trade, and be inscribed on the roll of traders of the Province.

The ship's husband represents the owners of the ship, and may, in his own name, and in that capacity, take action both Judicial and extra-Judicial in all that concerns trade.

B. Bk. II., 10, G. 460, H. 327, I. M.M.C. 52-56, N. 5, R. 830 diff.

596. The ship's husband may discharge the duties of captain of the ship, observing in all cases the disposition of Art. 609.

If two or more of the co-owners seek for themselves the post of captain, the difference shall be decided by the vote of the co-owners, and if the vote results in a tie, it shall be decided in favour of the part-owner who holds the largest share in the ship.

If the shares of the candidates are equal, the tie shall be decided by lot.

The other Codes are silent on this point, though it is generally recognised that a part-owner may be captain. The question whether the captain is also ship's husband is, in Spain, of considerable importance, having regard to the provisions of Art. 588, *ante*.

597. The ship's husband will select the captain and settle accounts with him, and will contract in the name of the owners for such things as are necessary in all that relates to repairs, details for the crew, stores, provisions, fuel, and freight for the ship, and in general for whatever concerns the necessaries for the voyage.

G. 460, H. 328, 330, I. 494, N. 5, 9 diff., R. 824, 880 diff.

598. A ship's husband cannot arrange a new voyage, nor settle a new freight, nor yet insure the ship without the

authority of his owners or the consent of the majority of the co-owners, unless these powers were conferred in the deed appointing him. If he insures without authority so to do, he is liable subsidiarily for the solvency of the insurer.

G. 460, H. 331, 333, N. 5, R. 824 diff.

599. A ship's husband who is manager for co-owners, shall render accounts to the part-owners of the result of each voyage of the ship, without prejudice to the books and correspondence concerning the vessel and its voyages being always held ready for inspection by the same persons.

G. 466, H. 338, R. 824.

600. When the accounts of the ship's husband, who is manager, are passed by a majority, the co-owners must pay the share of expenses proportioned to their holding, without prejudice to Civil or Criminal proceedings that the minority may deem it fit to take subsequently. To enforce payment, ship's husbands who are managers have an action of execution (*acción ejecutiva*), which is carried out in virtue of the consent of the majority and without other procedure than the identification of the signatures of the consenting parties.

G. 466, H. 339-340, N. 8.

601. If there are profits, the co-owners can recover from the ship's husband, who is manager, the portion corresponding to their share by an action of execution, without anything being requisite beyond the identification of the signatures of the document passing the accounts.

G. 469.

602. The ship's husband will indemnify the captain for all disbursements that he has made out of his own funds or those of others, for the service of the ship.

G. 496-503.

603. Before the ship goes to sea, the ship's husband can discharge the captain and members of the crew at his

pleasure, if they are not engaged for a fixed period or specific voyage, on paying them the wages they have earned under their contracts, without any compensation, unless it has been otherwise agreed specifically and expressly.

B. Bk. II., 8, 48, 62, F. 218, 252, 270, G. 460, 515-517 (1872), 28, 57, H. 328, 411, 413, I. 494, 542, M.M.C. 74, 75, N. 5, 9, 10, 31, 32.

• 604. If the captain or other member of the crew is discharged in the course of the voyage, he will receive his pay down to his return to the port where he was shipped, unless the discharge was justifiable, everything being done in accordance with Art. 636, *et seqq.*, in this Code.

B. Bk. II., 62, 64, F. 272, 274, G. 515-520 (1872), 57-59, H. 328, 412, 439, I. 529, N. 9, 31, 32, R. 994, 995.

605. If the engagements entered into by the captain and crew with the ship's husband are for a fixed time or voyage, they cannot be discharged before the completion of their contracts, except on account of mutiny (*insubordinación en materia grave*), robbery, theft, habitual drunkenness, or damage done to the ship or its cargo wilfully or by negligence, either obvious or proved.

B. Bk. II., 8, 48, 62, 64, F. 218, 252, 270, 272, G. (1872) 57 diff., H. 436, 437, I. 542, N. 9, 29-31.

606. When the captain is a part-owner, he cannot be discharged unless the ship's husband repays him the value of his share, which, failing an agreement by the parties, will be assessed by experts nominated in the manner established by the Law of Civil Procedure (*Ley de Enjuiciamiento Civil*).

B. Bk. II., 9, F. 219, G. 522, H. 329, I. 494, N. 9.

607. If a captain who is a part-owner has obtained the command of the ship by a special agreement set out in the articles of partnership (*el acto de la sociedad*), he cannot be deprived of his place except for the causes mentioned in Art. 605. •

This article is peculiar to the Spanish Code, but there would almost certainly be some clause in any deed of partnership enabling the co-partners to get rid of a captain who was part-owner, if guilty of such acts as are here referred to, or if he otherwise acted in a manner prejudicial to the partnership.

608. If the ship is sold voluntarily, all contracts between the ship's husband and master are terminated, reserving to the latter his right to what compensation may be due according to his agreements made with the ship's husband. The vessel which is sold remains liable as security for the payment of this compensation if, after an action has been brought for it against the vendor, he is found to be insolvent.

F. 208.

SECTION II.

Of Commanders and Masters of Vessels.

609. Captains and masters must be Spaniards, and of legal capacity to make contracts in accordance with the regulations of this Code, and have shewn that they have the skill and capacity, and fulfil the conditions necessary to command and sail a ship, as laid down in the Laws, Ordinances and Regulations for the Mercantile Marine and Navigation, and are not under any incapacity as laid down therein which prevents them from assuming this duty.

If the owner of a ship wishes to be his own captain and has not the legal qualifications, he will confine himself to the ship's commercial business (*administración económica del buque*), and entrust the navigation to some person possessing the qualifications required by the said Ordinances and Regulations.

610. The functions hereinafter mentioned are inherent in the post of Captain or Master of a ship:—

- (1.) In the absence of the ship-owner, to choose and engage the crew, and if he is present to submit them for his approval, whilst the ship-owner cannot engage any one in the face of his express refusal.
- (2.) To command the crew and sail the ship to its port of destination, in conformity with the instructions he has received from the ship-owner.

- (3.) Whilst on board, to carry out, in conformity with the Laws and Regulations of the Mercantile Marine, punishments due to those who fail to fulfil his orders or are guilty of breaches of discipline, and to draw up depositions with regard to offences on board whilst at sea, which will be sent to the Authorities who have cognisance of them in the first port at which the vessel touches.
- (4.) In the absence of the ship-owner or his agent, to engage freight for the ship, in conformity with the instructions he has received, and giving his utmost care to the owner's interests.
- (5.) To take all proper steps to keep the ship seaworthy in all respects, buying what is necessary for the purpose where there is not time to await the owner's instructions.
- (6.) In case of urgency whilst on a voyage, to make such repairs to hull and machinery, apparel and furniture, as may be absolutely necessary to prosecute and complete the voyage, but if he comes into a port where the owner has an agent, to carry out the work in conjunction with him.

(1.) B. Bk. II., 14, F. 239, G. 495, H. 343, I. 499, N. 10, R. 935.

(2.) B. Bk. II., 28, F. 238, G. 484, H. 354, 361, I. 514, N. 9.

(4.) B. Bk. II., 22, S. 495-497, H. 371, 372, I. 506, 507, 509, N. 42, R. 893.

(5. & 6.) B. Bk. II., 24, F. 232, 234, G. 495-497, H. 371, 372, I. 506, 507, 509, N. 11, R. 912.

611. To carry out the duties mentioned in the preceding Article, the captain, when he finds himself without money or any prospect of receiving any from the owner, will procure it as follows:—

- (1st.) By requesting advances from the agents of the ship or agents of the owner.
- (2nd.) By recourse to the consignees of the cargo or persons interested in it.

- (3rd.) By drawing upon the ship-owner.
- (4th.) By borrowing the sum required on bottomry.
- (5th.) By selling the quantity of cargo necessary to produce the sum required for the repairs absolutely necessary to enable the ship to prosecute her voyage.

In the last two cases, the captain must have recourse, if in Spanish territory, to the Judicial Authority, and if abroad, to the Spanish Consul, or if there is none to the Local Authorities, proceeding in accordance with the dispositions of Art. 583, and with what is laid down in the Code of Civil Procedure.

B. Bk. II., 24, F. 234, G. 497, 503, 681, 686, H. 372, N. 11, 95, 97, R. 912, 1060, 1061, Sw. 42, 47, 127, 179.

F. W. RAIKES.

IV.—THE ALASKAN OR BEHRING SEA FISHERIES.

I.—HISTORY.

IN a recent article in this *Review** on the North Atlantic Fisheries, I predicted that the Behring Sea and Strait Fisheries must either be amicably settled, or serious difficulties would arise between ourselves and the United States. I, therefore, propose to consider the British and International rights as to the Behring Sea and Strait Fisheries. In passing, however, I have to remind the reader that the British Plenipotentiaries sent to the United States in 1887 were authorised to settle all pending Fishery disputes; and that the United States Commissioners refused to go beyond the Convention of 1888 as to the North Atlantic Fisheries; and that even this Convention was rejected by the United States Senate, and consequently that both this Convention and also the

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modus vivendi gratuitously offered to the United States Commissioners by the British Plenipotentiaries fell to the ground. I have nothing to add to, or subtract from, the observations which I made in that article. I still think that this Convention was a fair and reasonable settlement of the questions then attempted to be settled.

Russian Discovery of Alaska in 1741, and Government by Russia.

The discovery of Alaska, by Veit Bering, a Dane, who entered the Russian service in 1704, and who set out from Kamschatka on the 4th June, 1741, to find the American continent opposite the continent of Asia, admirably displays the stolid, calm, and intrepid character of the Russian people in its highest aspects. Bering had under his command two small, rude, sailing vessels. But he soon encountered a violent storm which separated his vessels, and his own ship having drifted to the Alaskan mainland on the 18th July, he passed six weeks on the Kodiak Island. On the 3rd September, he and his crew were driven by a violent tempest into the Pacific, as far South as $48^{\circ} 8' N.$ As his men were dying every day from toil and hardship and destitution, he resolved to return to Kamschatka. Under the charge of his second officer, his ship was piloted out of her course, and every hope of returning home that year had to be abandoned. The men suffered dreadfully from cold and wet and scurvy, and were soon largely reduced in numbers by weakness and death. Rain was followed by snow; and the crew lived in momentary dread of shipwreck on the numerous islands in the Pacific. From the 1st to the 4th November, the ship, helpless and drifting, lay like a log on the ocean. In making for land, she twice struck on a rocky reef. Mercifully and providentially, a huge wave lifted her over the reef, and placed her in calm water, and her last anchor was dropped, and

Bering's luckless voyage of Alaskan discovery was brought to an end. Bering soon afterwards died on an Island since named after him. Forty-five of the crew lived through the winter. Having ascertained that there was an extensive territory to the eastward of Kamschatka, they, in a shallop, built out of the remains of their ship, sailed from Bering Island on the 16th August, 1742, and reached Petropaulowsky on the 27th of the same month and year. In 1745, Michael Noviskov was the first white man who sailed across the green waters of "Behring" Sea in a rude open wooden shallop from Kanischatka, and landed at Attoo. He was a hardy fur hunter, and so were all the numerous early Russian explorers of the Alaskan coasts and waters. By the end of 1768-9, a large area of Russian America was well defined and mapped. The early history of Alaska is of the cruel and stereotyped character, with which we are familiar in the dealings of ruthless and fearless adventurers with simple natives living in an uncivilised and savage condition. The natives rose against the iron rule of the Slavonians, and again and again slew the whole crews of various ships. The different Cossack and Muscovite adventurers and trading companies, in Russian America, also often quarrelled amongst themselves, and nearly brought the Russian power and trade in Alaska into grave danger. Ultimately, in the year 1799, the whole of Alaska was placed by the Czar Paul I., under the autocratic control of the Russian-American Company, which carried on a very profitable business in furs, so long as its business was managed on purely commercial principles. The charter of the Russian-American Company conferred the most autocratic powers of government on the Company, and gave an exclusive right to all the territories in Alaska, Kamschatka, and the Siberian Obolsk and Kurile Districts, and subjected the Company to various obligations as to the maintenance of religion, law, and military and naval forces. For twenty

years Alexander Baranov successfully conducted the affairs of the Russian-American Company, as a trading company. After his administration, a strong naval and military element was introduced into the government, and the revenues then began to diminish, and large pecuniary losses were sustained by the Company's stockholders, and also by the Russian Imperial Treasury. After Baranov's administration ceased in 1818, Sitka, the chief seat of the Russian-Alaskan Government, became noted for the great elegance and extravagance of the Russian Alaskan rulers and their subordinates. The first charter of the Russian-American Company was granted for twenty years from the 1st January, 1799; and, being the first Russian company of the kind, excited the wildest dreams of avarice and ambition in the minds of the Russian people from the Czar to the humblest shareholder of the company. These dreams comprehended the trade of China and Japan, and the Russian annexation of the whole of the American coast, including California. But, from 1818, the trading instinct of frugality was exchanged for the military and Imperial habits of prodigality. Although the Governor's Reports were written in the grandest and most glowing terms, the Company's dividends were becoming less and less. A second term of the Company's charter expired in 1841; and a new charter, with increased powers, was confirmed by the Czar in 1844. But extravagance and waste went on increasing; and, by the end of the third term under its charter, in 1864, the Company was deeply in debt, and wished to transfer the cost of administration to the Russian Home Government. The Imperial Government would not agree to this proposal, and sent a Commission to Sitka to see what could and ought to be done.

Transfer of Alaska to the United States.

Soon afterwards, Mr. Seward, Secretary of State of the United States of America, entered into negotiations with

the Russian Government for the ultimate and speedy acquisition of Russian America by the United States. The Russian Government was not unwilling to sell its whole rights in North America. Accordingly, in May, 1867, Alaska was sold to the United States for 7,200,000 dollars, and was formally transferred to the Americans in the October following. In the Treaty by which Alaska was handed over to the United States by Russia, it is stated that the concession included all the territory over which the Czar had exercised sovereign rights, both on the continent and the adjacent islands. This Treaty defined the limits of the concession to be "a line starting from the Arctic Ocean and running through Behring Strait to the north of the St. Lawrence Islands. The line runs thence in a south-westerly direction, so as to pass mid-way between the Island of Attoo and Copper Island in the Pacific." Under this Treaty, the United States claim to exercise sole jurisdiction and dominion over the whole Eastern half of the Behring Sea. So long as Alaska formed part of the dominions of the Czar, Russia claimed exclusive proprietorship of the sea between her Asiatic and American dominions. When she sold Alaska to the United States, it was agreed between Russia and the United States that this stretch of water should be divided between the contracting parties. But a bargain of this kind, which runs counter to the established usage of nations, is only binding on those actually parties to it. The general rule of the Law of Nations is that exclusive jurisdiction over the waters surrounding or bordering on any country does not extend beyond three miles from the shore. This is the principle for which the United States contended when Russia was owner of both sides of the Behring Sea; and it is not affected by the sale of the Alaskan territory by Russia to the United States. It must still be insisted on as applicable to the Pacific seaboard.

The Treaty was communicated to Congress on February 6, 1867, with a request for the necessary legislation. A copy of the Treaty of Cession and of the correspondence relating to it, and other correspondence, with information in relation to Russian America, including Mr. Sumner's speech, was communicated to the House on 17th February, 1868. The Act was, at last, passed on 27th July following.

Lease to the Alaska Commercial Co. in 1870.

In 1870, the United States granted a Lease, for 20 years, of the Prybyloff Islands, with certain Seal Fishery Rights thereto annexed, to the Alaska Commercial Company, at an annual rent of £11,000, and, amongst other things, 10s. or so for each seal skin obtained. The estimated rent paid by the Company to the United States is £67,000 per annum, or about 4 per cent. on the price paid for Alaska by the United States to Russia. Beyond the Prybyloff Islands of St. George and St. Paul, the Alaska Commercial Co. has no exclusive rights of fishery. But, in order to maintain an exclusive monopoly to this Company within the Prybyloff Islands, the American Revenue cruisers have exercised the right of visitation and search over all fishing vessels in the Behring Sea, and have had several vessels, belonging to British as well as American owners, condemned for alleged violations of the rights of the United States Government, which now lays claim to the privileges set up by the Russian Government, but which were never acknowledged by the Comity of Nations, and were, indeed, as we shall presently find, both repudiated and ridiculed by the United States Government itself more than 50 years ago.

The Czar's Ukase of 1821.

By an Ukase of the Emperor Alexander I. of Russia, of the 4th (16th) September, 1821, an exclusive territorial right on the north-west coast of America was asserted to belong to the Russian Empire, from Behring's Straits to the

51st degree of North latitude, and in the Aleutian Islands on the east coast of Siberia, and the Kurile Islands, from the same Straits, to the South Cape in the Island of Ooroof, in $45^{\circ} 51'$ North latitude. Further, all other nations were prohibited from navigating and fishing in the Islands, Ports, and Gulfs within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them within the distance of 100 Italian miles, under the penalty of confiscation of the cargo. This Ukase alleged that it was based on the general Law of Nations and immemorial usage; and, in particular, that it was founded on the titles of first discovery and first occupation, and on a peaceable and uncontested occupation of more than half-a-century. It also asserted that the extent of sea, of which the Russian possessions on the Continents of Asia and America formed the limits, fulfilled all the conditions which ordinarily attached to shut seas (*mers fermées*). It also alleged that the Russian Government might consequently deem itself authorised to exercise, upon this sea, the right of sovereignty, and specially that of entirely interdicting the entrance of foreigners therefrom; but that it preferred only to assert its essential rights, by measures adopted to prevent contraband trade within the chartered limits of the Russian-American Company. This Russian Ukase, claiming the waters of the North-western Coast of America to the extent of 100 Italian miles from the shore, is discussed in Lyman's *Diplomacy of the United States*. It was the cause of long discussions, between Russia and the United States and Great Britain, which ended in the Treaties of April, 1824, and of February, 1825, to be hereafter mentioned.

The U.S. Government Repudiated this Ukase.

The Secretary of State of the United States of America, Mr. John Quincy Adams, in his reply to a communication by

the Russian Minister at Washington, stated that, from the independence of the United States as a nation, the vessels of the United States had freely navigated those seas, and that the right to navigate them was a part of their independence. He totally denied the Russian claim to any part of America south of the 55th degree of North latitude ; cited the charter of the Russian-American Company to the effect that this parallel was the southern limit of the discoveries made by Russia in 1799 ; and asserted that, since that year, no discoveries or establishments south of that line had been made on the coast claimed by Russia. Mr. Adams ridiculed the idea of applying the principle of *mare clausum* in this case, by observing that the distance between the Russian coasts on the parallel of 51° was not less than 4,000 miles. Cf. *Annual Register* LXIV., 576-584 : Correspondence between Mr. John Q. Adams and M. Poletica. This point is worth a volume of arguments now, or at any other time.

Convention of 1824 between the United States and Russia.

Negotiations on this subject were finally concluded by a Convention between the two Governments, signed at St. Petersburg, on the 5th (17th) April, 1824. The Convention contains the following stipulations :—

“ Article 1. It is agreed that in any part of the great ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting parties shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles :—

“ Article 2. With the view of preventing the rights of navigation and of fishing, exercised upon the great ocean by the citizens and subjects of the high contracting parties,

from becoming the pretext of an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the Governor or Commander; and that reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the North-west coast.

“ Article 3. It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the North-west coast of America, nor in any of the Islands adjacent, to the North of 54 degrees and 40' of North latitude; and that in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, South of the same parallel.

“ Article 4. It is nevertheless understood, that, during a term of ten years, counting from the signature of the present convention, the ships of both Powers, or which shall belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.”

In reference to this Convention of 1824, Wharton, in his *Digest of the International Law of the U.S.A.*, § 159, Vol. II., p. 226, cites President Monroe's communication to Mr. Madison on 2nd August, 1824, to the effect that “ by this Convention the claim of *mare clausum* is given up; a very high northern latitude is established for the boundary with Russia, and our trade with the Indians placed for ten years on a perfectly free footing, and after that term left open for negotiation. . . . England will, of course, have a similar stipulation in favour of the free navigation of the Pacific, but we shall have the credit of having taken the lead in the affair.” For the corres-

pondence, with regard to the Convention of 1824, transmitted to the Senate, Wharton (*op. cit.*, § 159, Vol. II., p. 270) refers to Vol. 5, of Fol. ed. of Foreign Relations, pp. 432-471, and for the Papers relative to the conflicting titles of Russia and Great Britain on the North-west coast of America, to House Doc. 328, 1st Sess. 17th Cong.; 4 Am. State Papers (Foreign Relations, 851). At the time the Convention of 1824 was agreed upon, the United States Government expressly declared (1) that by entering into this Treaty, they did not intend to surrender their privilege under the Law of Nations; (2) that there was no ground for alleging an abandonment to Russia of their rights beyond $54^{\circ} 40'$ as to the coast; (3) that the Treaty was to be read as a whole in its tenor and purport and not in its individual clauses; and (4) that it was to be looked at in the light of the Treaty of 1825 between Great Britain and Russia. If these official arguments were good and well-founded in fact and law fifty years ago, they are good now. I shall hereafter show that they are good and well-founded, and that the United States of America cannot, on the acknowledged principles of International Law, now put forward any claims inconsistent with those for which they formerly and always have contended.

Expiration of the Convention of 1824.

Under the Convention of 1824, the Russian Government excluded American vessels from all parts of the coast, on which the United States had stipulated to form no establishments; and consequently prohibited them from trading on the unoccupied parts of the coast, north of the parallel $54^{\circ} 40'$. The American Government protested against this prohibition, and, at the same time, proposed to the Russian Government to renew the stipulations of the Convention of 1824, for an indefinite period of time. *Vide Greenhow, History of Oregon and California*, 343-361. The

arguments of the United States are contained in a letter of instructions dated the 3rd November, 1837, from the Secretary of State, Mr. Forsyth, to the American Minister at St. Petersburg; but they had no effect on the Russian Cabinet, which declined to renew the engagements contained in the 4th Article. *Vide* Cong. Doc., Sess. 1838-9, I. 36. Greenhow, 361-363.

Convention of 1825 between Great Britain and Russia.

Great Britain having also formally protested against the claims and principles set forth in the Russian Ukase of 1821, immediately on its promulgation, and subsequently at the Congress of Verona, the controversy between the British and Russian Governments was terminated by a Convention signed at St. Petersburg, on February 16th (28th), 1825. This Convention also established a permanent boundary between the territories respectively claimed by the two Powers on the Continent and Islands of North-Western America. It contained articles similar in effect to the 1st and 2nd Articles of the Treaty of 1824 between the United States and Russia. By its 3rd and 4th Articles, it was agreed that "the line of demarcation between the possessions of the high contracting parties upon the coast of the Continent and the Islands of America to the North-west" should be drawn from the southernmost point of Prince of Wales Island, in latitude 54 degrees, 40 minutes N., eastward, to the great inlet in the continent called Portland Channel, and along the middle of that inlet to the 56th degree of latitude, whence it should follow the summit of the mountains bordering the coast, within ten degrees north-westward to Mount St. Elias, and thence north in the course of the 141st meridian west from Greenwich, to the Frozen Ocean, "which line shall form the limit between the Russian and the British possessions in the continent of America to the north-west." The 5th and 7th Articles of this Convention

were in similar terms to Articles 3 and 4 of the Convention of 1824. This Treaty also contains the following additional stipulations:—

“ Article 6. It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean, or from the interior of the continent, shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in Article 3 of the present convention.

“ Article 8. The Port of Sitka, or Novo Archangelsk, shall be open to the commerce and vessels of British subjects for the space of ten years, from the date of the exchange of the ratifications of the present convention. In the event of an extension of this term being granted to any other power, the like extension shall be granted also to Great Britain.

“ Article 9. The above-mentioned liberty of commerce shall not apply to the trade in spirituous liquors, in fire arms, or other arms, gunpowder, or other warlike stores; the high contracting parties reciprocally engaging not to permit the above-mentioned articles to be sold or delivered in any manner whatever to the natives of the country.”

The 10th and 11th Articles contain regulations respecting British or Russian vessels navigating the Pacific Ocean, and putting into the ports of the respective parties in distress, and for the settlement of all cases of complaint arising under the Treaty. *Vide* Greenhow, 469; *Proofs and Illustrations I.*, No. 5.

Claims of the Alaskan Commercial Co. discussed.

The contention of the Alaskan Commercial Co., established by the United States, is that all the waters between the Island of Attoo and the Copper Island in the North

Pacific Ocean to the western end of the Aleutian Archipelago are Alaskan waters, and that all laws and regulations made by the United States with reference to the killing of fur-clad animals hold good within those limits. The Company also contend that their lease should be interpreted by the Russian Cession to the United States. If the theory of the extent of the maritime jurisdiction, on which this Russian-American Treaty is based were accepted, the Alaskan Commercial Company would be the virtual owners till 1890 of many thousands of square miles of the great North Pacific Ocean. But the Russian claims were never admitted, and were denied by none more strenuously than by the United States Government. Russia claimed the Behring Sea within certain limits as a closed sea; but she never proved her claim. All the other great European Powers have maintained that this sea is an open sea, and that the three mile rule applies to Alaska and all the Aleutian Archipelago. Further, within the last two years, the American Government has entered into negotiations with the Great Powers for the purpose of trying to establish a close season for fishing for seals in the Behring Sea. No doubt, the Congress of the United States in 1888, passed a Statute imposing on the President the duty of causing "one or more vessels of the United States to diligently cruise the waters (of Behring Sea) and arrest all persons and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein." Under this Act several lawless and irritating seizures, as I shall afterwards point out, have been made by United States Revenue Cutters in the Behring Sea. Such seizures, in my opinion, are as indefensible in law as they have been ineffective in fact. Under their lease the Alaska Commercial Company contend that, within the Prybyloff Islands, they have all the fishing rights which Russia ever had, or over which the Czar of Russia, or his

lessees, exercised sovereign rights as sovereign of Alaska. No foreigner can lay claim to any fishing rights justly belonging to the Alaska Commercial Company. Here the real point in dispute is in regard to the extent of the sovereign rights of the United States, as the proprietors of Alaska, in the adjacent ocean, and in the Behring Strait. In the assertion of these contentions the United States support and protect their own lessees, and by means of public vessels aid them in maintaining their claims. Nay more, such public vessels aid them in excluding foreign and all other vessels, other than the Company's vessels, from fishing in the Behring Sea, which is hundreds of miles from the Prybyloff Islands. In fact, by so acting, the U.S. Government try to re-assert the sovereignty claimed by Russia in this quarter of the globe. An assertion of a right, however, by a claimant does not settle the legality of the right, and as little does the denial of such an assertion decide its illegality. Thus, as I have pointed out, Russia claimed that the Behring Sea was a closed sea and belonged exclusively to her. Other nations refused to acknowledge this Russian claim, and the United States, as strongly as any, declared that it was open to all the world for the purposes of navigation and fishing. The Americans contend that the Eastern half of the waters between Alaska and Siberia are under the control of the United States and their lessees. By control, they mean dominion and ownership. Consequently, they assert a right to the Behring Sea as a part of their territory, and claim that they have the power to grant, or refuse, the right of navigation and fishing therein as much as they have the power to grant or refuse these rights over the lakes, seas, and rivers enclosed within their territory. *Vide* Wheaton, *Elements*, § 192; Halleck's *International Law*, p. 136; Woolsey's *International Law*, § 57; Abdy's Kent's *International Law*, p. 108, n. 1. That every Independent State has the sovereign

and absolute right to make laws as to its territory and the property within its territory is an unquestionable axiom of the Law of Nations. This sovereign right "is founded on the title originally acquired by occupancy, conquest or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with Foreign States." *Vide* Wheaton, Chap. IV., on Rights of Property. Therefore, we need not be surprised that, in the circumstances of this question, the United States passed an Act of Congress in 1888 authorising the President to cause one or more vessels to cruise in the Behring Sea, and to arrest all persons and seize all ships violating the laws. The question here arises, what laws are here meant, and how far do they apply? Is it the Law of Nations, or the Municipal Law of the United States? If the Behring Sea is an open sea, the United States have no right to arrest foreigners or their vessels at a greater distance than three miles from the Alaskan shores. That they can arrest their own subjects and the vessels of their own subjects beyond this distance is, I think, undeniable, but does not concern me at present. Further, that the United States may have granted a monopoly of the seal fishing on the Islands of St. Paul and St. George to the Alaska Commercial Company, may be a good ground for this Company endeavouring to enforce their claims, and for the United States to support their lessees; but does not in the least degree affect the question as to the International right and legality of such a claim.

Closed Fishing Season.

As regards the killing of seals at inopportune or unsuitable times and periods, I admit that the killing of very young seals is wrong and unjustifiable, and that the times and periods for killing seals in the Behring Sea and Behring Straits is a matter for regulation by a Treaty agreed upon

by all the nations interested or concerned in such fishings, and by special laws. But neither the United States of America, nor any other country, has any legal right to make regulations as to such fishings on the High Seas. To all intents and purposes, the Government of the United States must be held to have admitted as much as I here contended for, by having recently made proposals to the Great Powers for the regulation of Seal Fishing. •

Question Stated.

Till 1867, when Alaska was sold and transferred by Russia to the United States of America, the whole of the Alaskan Territory, with its annexed and adjacent Islands, the Strait and the Sea of Behring lay between the Territories of Russia; and was therefore bounded by Russian land on its eastern and western sides. But the Strait and the sea of Behring are no longer in this condition, and to both of them, for the purposes of commerce, navigation and fishing, all nations have, conformably to the Law of Nations, a right of free access for their ships and their subjects. Behring Strait is 36 miles wide at its narrowest points; and the Behring Sea is, I hold, part of the Pacific Ocean, or High Seas. As all the seizures of which British shipowners complain have been made in the Behring Sea, I shall, for the present, confine my observations here to the Behring Sea. Before 1867, Russia claimed the ownership and sovereignty of the whole of the Behring Sea. Since then, the United States have claimed an absolute jurisdiction over the Eastern half of the Behring Sea, and it is with this contention that we have now to deal. Just as the earth is the common inheritance of mankind, and each nation has a right to appropriate a share of it by occupation and cultivation, so the ocean is the common inheritance of mankind, and each nation has a right to use it for fishing, navigation and commerce, and to enjoy,

unmolested, the fruits of their labours. But then, such rights must be subject to the common rights of all, and the special rights acquired by any under Treaty, and in virtue of long-established custom. I shall discuss the pending questions from a purely legal and International point of view; and must therefore observe that all foreign nations are, as much interested in these matters as we are ourselves.

I have not here to deal with any disputes as to the territory or commerce of Alaska, but merely with Rights of Navigation and of Fishery in the Behring Sea, and to arrive at a conclusion in regard to them on the basis of International Law, and International Treaties. I therefore propose to state the facts of the British claims which have arisen in regard to the Fishery and Navigation of the Behring Sea, and lay down the Law from unquestionable authority, and then to apply the Law to the facts in the case. I shall, therefore, take these several points in their order.

Seizures in 1886 and 1887.

In 1886, three Canadian ships were seized by the United States in the Behring Sea, and, on the complaint of the British Government, were ordered by the American Secretary of State to be released. These three ships were the *Carolina*, the *Onward*, and the *Thornton*, of British Columbia. They were fitted out at Victoria, in British Columbia, for catching seals in the waters of the Northern Pacific Ocean and Behring Sea; and at the time of their seizure on the 1st and 2nd August, 1886, were at the very least 60 miles distant from the nearest land. The United States Revenue cutter, *Curwin*, took them to Ounalaska. Of the *Carolina* and the *Thornton*, the crews, with the exception of the captain and one man detained on board, were sent to San Francisco, nearly 1,000 miles from home, and were turned adrift to beg their bread. By appealing to the charity of the humane, they found their way back to their

homes on Vancouver Island. The crew of the *Onward* were kept at Ounalaska ; of the *Thornton*, the master and mate were brought to trial before Judge Dawson, of the United States District Court at Sitka, who denounced the sealers as pirates and robbers. This trial was a parody, in which Justice, International Law, and the Comity of civilised nations were unjustifiably and unblushingly excluded. Both the master and the mate of the *Thornton* were found guilty of the charges made against them. The master was sentenced to be imprisoned for 30 days, and to pay a fine of 500 dollars ; and the mate was sentenced to be imprisoned for 30 days, and to pay a fine of 300 dollars. The master and mate of the *Onward*, and the officers of the *Carolina*, were condemned in similar penalties. Nor were the misfortunes of the masters, and mates, and crews of these British ships at an end in the Law Courts and Prisons of the United States. The master of the *Carolina*, an old man, and a pioneer of British Columbia, by name James Ogilvie, after suffering harsh and inhuman treatment at the hands of the servants of the United States of America, was suffered to wander in the woods, where he died from want and exposure. The other masters and mates, after remaining in prison for several months, were released by the Governor of Alaska. Turned out of confinement, and literally destitute, and without food or shelter, they were compelled to find their way back to their homes, which were 1,000 miles distant, and which could be reached only by a long and costly voyage, or by the friendly help of the American Indians and a canoe, over the tempestuous wintry ocean. Since 1886 the three schooners thus seized and condemned, although afterwards released on complaint to the United States Government, have lain on the beach of Ounalaska, and have become worm-eaten and worthless. For all these barbarous, inhuman, and injurious acts, compensation has been asked, but has never been paid

by the Government of the United States. If the facts which I have now related can be substantiated, as I believe they can, no time should be lost by the British Government in insisting on the rights of our Colonial fellow subjects in British Columbia. To protect and defend all subjects and their rights is a duty of every State; and when the Tribunals of a foreign country fall into error, it is the duty of the Government of such Tribunals to grant redress, and of a Government whose subjects are thus injured, to demand, and, if necessary, enforce it. The seizures of the *Carolina*, the *Onward*, and the *Thornton* having been made over sixty miles from the nearest land, were clearly illegal and contrary to the Law of Nations. Several other seizures, of which complaints have been made by the British to the United States Government, have been illegally made in the Behring Sea—e.g., the *Anna Beck*; the *Dolphin*, and the *Grace*, and all seized in the Behring Sea, from 30 to 40 miles from land. *Vide* Canadian Sessional Papers (No. 48), of 1887. Legal proceedings were taken in 1887, in the Courts of the United States, against the Commander of the *Curwin*, but were never, so far as I can find, brought to a termination.

Seizures in 1889.

In August, 1889, three ships, the *Pathfinder*, the *Minnie*, and the *Black Diamond*, while engaged in seal fishing in the Behring Sea, were boarded and searched by the United States cruiser *Rush*, and, with a Prizeman on board of each, were despatched to Sitka. So far as I have been able to ascertain the facts, the true state of matters appears to stand thus:—The crews of several British vessels were engaged, in July last, in catching seals off the coast of Alaska. The ships were boarded and searched by the Lieutenant of the United States Revenue cutter *Rush*, and in the cases of the *Black Diamond*, the *Minnie*, and the *Path-*

finder, the vessels and crews were seized and ordered, under a Prize crew of one man on board each vessel, to sail for the American settlement of Sitka, in Alaska, to be there tried according to the laws of the United States. The British schooner *Allie Algar* was also boarded and searched by the Lieutenant of the *Rush*, on the 30th July last, in the Behring Sea, about 50 miles from St. Paul's Island. As she had no seal skins on board, she was allowed to return to Victoria, in Vancouver's Island, without further molestation. The *Minnie* and the *Pathfinder* were said to have had each 800 seal skins between their decks. Besides the *Black Diamond*, the *Minnie*, and the *Pathfinder*, the *Rush* has made other seizures—e.g., the American schooner *James G. Swann*—but with the seizure of American vessels the British Government has nothing whatever to do. I, therefore, put them on one side in this discussion of the International questions involved in the Behring Sea Fisheries. Of course, if there are differences between Great Britain and the United States as to the facts, the truth can be easily found out by a Commission, now or at some future time to be appointed, to take evidence as to the claims by British citizens in reference to the matters in dispute.

Instead of sailing to Sitka, the captains of all these three British vessels, seeing that the prize officers were really in their power, declined to sail for Sitka, but sailed to and arrived at Victoria in British Columbia, where the excitement was at fever pitch against the United States for boarding, searching, and even perfunctorily, and almost comically, attempting to make prizes of British ships in the Behring Sea. About the same time there were three British vessels boarded and searched by the *Rush*; but, as they had no seal skins on board, they were allowed to depart without further molestation. According to a commercial cable received in London, early in October last, Judge Sawyer, of the United States Circuit Court, at San

Francisco, gave a decision on the 2nd October last, in a test case on the seizures of the sealers, to the effect that the seal skins captured were confiscated, and that this decision also applied to the sealers which ran away with the prize crews on board. As I have not seen this decision fully reported I shall here confine my observations at present to the general International aspects of the question. Doubtless this Judgment, as it ought to be, will be appealed, if necessary, to the Supreme Court of the United States at Washington.

Now, if such vessels, or any of them, have been boarded and searched within the distance appropriated by International Law to every free and independent State for the exercise of territorial rights, no wrong was done for which damages, or an apology, can be demanded by our fellow subjects, or by our own Government, for an unwarrantable insult to the British flag. But, if such boarding and searching took place on all or on any of these vessels, on the High Seas, or on waters within which we have, by the Law of Nations, or by Treaty, the right to fish, a wrong was done for which damages and an apology can be legally demanded by our fellow subjects and by our own Government. Failing to obtain damages and satisfaction, the Law of Nations allows us to enforce our claims by embargo in time of peace, or by all the lamentable and deplorable results and consequences of war. Therefore, the dispute which has arisen is one fraught with the greatest possible dangers, and ought not to be allowed to remain as a ground of quarrel, or as a festering sore, between two great and friendly nations, whose greatest interests and policy are to advance and promote the peace and prosperity of all their subjects in every part of the world. Although all the facts involved in this question are not yet authoritatively made public, yet we deem it desirable that the grave questions at issue, and the general Law

applicable to them should be at once clearly and explicitly laid before our readers. At the same time, the British Home Government have acted with great prudence and promptitude by asking the Canadian Government to forward to them all claims which they may have against the United States for the alleged illegal proceedings of the American cruisers in the Behring Sea, and also by entering upon negotiations with the United States for a friendly settlement of all claims and disputes in reference to boarding, searching, and condemning British fishing-vessels in the Pacific Ocean. To seize, detain, or warn off any person or vessel from a place where such person, or vessel, is entitled to be, is a wrong or injury for which compensation is due, and such place may be in port, on the ocean, or in a sea, strait, or river. To grant compensation, when a wrong has been done to the subjects of a friendly nation by the public vessels of a Foreign State, is highly becoming to the magnanimity and candour of a great, enlightened, and peaceful nation. When treaties are broken, or the laws of commercial and maritime intercourse are abrogated, or the laws of hospitality or humanity are violated, then, a loss or injury has been sustained, and a claim for compensation, or redress, for the wrong done arises as a right to the individual and the State. For an independent nation to allow its national rights and liberties to be taken away is evidence of great weakness. As the United States have always been strenuous in their contention for their rights in the North Pacific and the Arctic Ocean, so should Great Britain be the same.

II. LAW.

Controversy respecting the Dominion of the Sea.

The controversy as to how far the open sea or main ocean, beyond the immediate vicinity of the coast, may be appropriated by one nation to the exclusion of others, can, says

Wheaton, § 186, hardly be considered open at this day. Grotius scarcely admits more than the possibility of appropriating the waters immediately contiguous; and yet he adduces a number of quotations from ancient authors, shewing that a broader pretension has been sometimes sanctioned by usage and opinion. He never intimates that anything more than a limited portion could be thus claimed; and he uniformly speaks of "*pars*" and "*portus maris*," and always confines his view to the effect of the neighbouring land in giving a jurisdiction and property of this sort. *Vide De Jure Belli et Pacis*, lib. II. c. 3, §§ 8-13. He had previously taken the lead in maintaining the common rights of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession, and the Papal grants under the famous Bull, issued by Pope Alexander VI., in 1493, by which he granted to the united crowns of Castille and Arragon, all lands discovered, and to be discovered, beyond a line drawn from pole to pole, 100 leagues west from the Azores, or Western Islands. Under this Bull, Spain claimed to exclude all other European nations from the possession and use, not only of the lands but the seas in the New World west of that line. Previous to this Bull, European nations had based their titles to their settlements in America on discovery and conquest; and Portugal, which claimed a portion of South America, amongst the rest, as well as Spain, Great Britain, France, and Holland disregarded the pretended authority of the Papal See, and pushed their discoveries, conquests, and settlements both in the East and West Indies. In fact, King Henry VII. of England granted a patent to John Cabot and his sons, authorising them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels, and to subdue, occupy, and possess those territories as his

vassals and lieutenants." In like manner, Queen Elizabeth granted a patent to Sir Humphrey Gilbert, empowering him "to discovet such remote heathen and barbarous lands, countries, and territories not actually possessed by any Christian prince or people, and to, hold, occupy, and enjoy the same, with all their commodies, jurisdictions, and royalities." The famous Treatise of Grotius, *De Mare Libero*, was published in 1609. Then Albericus Gentilis asserted the sovereignty of the Kings of England, claimed by them over the Narrow Seas, in his *Advocatio Hispanica*, published in 1613. In 1635, Selden published his *Mare Clausum*, in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. Father Paul Sarpi also wrote a vindication of the claim of the Republic of Venice to the sovereignty of the Adriatic. *Vide* Paolo Sarpi *Del dominio del mare Adriatico e sui reggioni per il Jus Belli della Serenissima Rep. de Venezia*. Venet., 1676, 12° Bynkershoek examined the general question, and admitted that certain portions of the sea may be susceptible of exclusive dominion, but on the ground of the want of uninterrupted possession, denied the claim of the English Crown to the Narrow seas. Cf. *De Dominio Maris, Opera Minora*, Dissert. V., first published in 1702. Puffendorf lays it down that, in a narrow sea, the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighbouring proprietors on a lake or river, supposing no compact has been made, "as is pretended," he says, "by Great Britain." But he denies that the main ocean can be appropriated. Cf. *De Jure Naturæ et Gentium*, lib. IV., cap. V., § 7. Vattel holds that the exclusive right of navigation, or fishery, in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to another by non-user on the principles of prescription, yet, that it

may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another. Cf. *Droit des Gens*, liv. I., ch. 23, §§ 279-286.

Review of the Points.

Wheaton, *Elements*, § 187, sums up this celebrated controversy as follows:—"There are only two decisive reasons applicable to the question. The first is physical and material, which would alone be sufficient, but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy.

"I. Those things which are originally the common property of all mankind can only become the exclusive property of a particular individual or society of men by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

"II. In the second place, the sea is an element which belongs equally to all men like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.

"It is thus demonstrated that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea, for these purposes, remains open and common to all mankind."—Cf. Ortolan, *Diplomatie de la Mer*, tom. I., pp. 120-126.

In a note on the foregoing passage of Wheaton, Mr. Dana adds, that "the right of one nation to an exclusive jurisdiction over an open sea was, as stated, in the text, vested solely on a kind of prescription. But, however long acquiesced in, such an appropriation is inadmissible, in the nature of things, and whatever may be the evidence of the time, or nature of the use, it is set aside as a bad usage,

which no evidence can make legal. The only question now is whether a given sea or sound is, in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation. The claim of several nations, whose borders surround a large open sea, to combine and make it *mare clausum* against the rest of the world, cannot be admitted. The making of such a claim to the Baltic was the infirmity of the position taken up by the Armed Neutrality in 1780 and 1800, and in the Russian declaration of war against England in 1807." He then quotes the following authorities in support of his position: *Ortolan, Dip. de la Mer*, I., 120-126; *Kent's Comin.* (Abdy's edit.), I., 110-112; *Wildman's Int. Law.*, I., 71; *Heffter, Europ. Völkerr.*, § 75; *De Cussy, Droit Marit.*, liv. I., lit. 2, § 39; *Halleck's Int. Law*, I., p. 135; *Woolsey's Int. Law.* §§ 54-56; *Manning's Law of Nations*, 25; *Rayneval's De la Liberté des Mers*, II., 1-108; *Hauteville, Droits des Nat. Neutr.*, liv. I., tit. I., ch. 1, § 4; *Twee Gebroeders*, Rob. III., 336; *Forty Nine Casks of Brandy*, Hagg. III., 290.

Wheaton proceeds in his § 187, to state that "by the generally approved usage of nations, which forms the basis of International Law, the maritime territory of every territory extends:—

"1st. To the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State. . . .

"2ndly. To the distance of a marine league, or so far as a cannon-shot will reach from the shore, along all the coasts of the State.

"3rdly. To the straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another."

In Sections 188 to 190, he expounds his views at length, in illustration of the three propositions above mentioned.

Article on the North Atlantic Fisheries in May, 1888.

As in the Article to which I have already referred, I have treated of the International Law as to seas, gulfs and rivers; Rights of Fishery, and Rights of Navigation and Commerce, I do not propose to repeat here what I have there laid down on these subjects, upon which, if necessary, the reader can consult the *Law Magazine and Review*, for May, 1888, pp. 283-87.

Visitation and Search in Time of Peace.

The only other point upon which I now wish to state the law as to the matters in dispute between Great Britain and the United States is in regard to the visitation and search of the vessels of one nation by the ships of war or cruisers of another nation, on the High Seas. On this point Wheaton, in his § 106, enunciates the law as follows:— “This jurisdiction which the nation has over its public and private vessels on the high seas is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the Law of Nations, being crimes not against any particular State, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas.

“Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This right cannot be employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic which is neither piratical nor contrary to the law of nations (such, for example, as the slave trade), unless the visitation and search be expressly permitted by international compact.” Cf. *Le Louis*, Dodson’s Adm. Rep. II., 238; *The Antelope*,

Wheaton's Reports IX., 122, 123; *The Marianna Flora*, Wheaton's Reports XI., 39, 40. When a vessel is seized while pursuing a lawful voyage on the high seas, such seizure is illegal. Cf. case of *The Cagliari* in Martens, *Causes Célèbres*, V., 600. .

In writing to Mr. West on the 19th October, 1886, Mt. Bayard, the American Secretary of State, used the following words, which are most appropriate to the present question, viz., that "Every nation has, on the high seas, the right of carrying on legitimate commerce under its own flag; and that there is no good ground for stopping a private vessel of the United States on the high seas as a slave trader; and that damages are due for the redress of the wrong to the private owner, and an apology is due to the nation for an injury done to the national flag." Cf. United States Correspondence as to the North-American Fisheries, No. 1 (1887), p. 165.

The Contentions of the United States as to the Three Mile Limit, and the Russian Claims. .

Dr. Wharton, in his *Digest of the International Law of the United States*, 1886, § 32, Vol. I., p. 102, citing MS. Notes, Spain, prints portions of a letter from Mr. Seward, Secretary of State, to Mr. Tassara on 16th December, 1862, where, in connection with the maxim, *Terræ dominium finitur ubi finitur armorum vis*, he lays down that "The range of a cannon ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvement of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the high seas was indispensably necessary, and this was found as the undersigned (Mr. Secretary Seward) thinks in fixing the limit at three miles from the coast. This

limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet these points involved in the subject are insisted upon by the United States: *First*, that this limit has been generally recognised by nations; *Second*, that no other general rule has been accepted; and *Third*, that, if any State has succeeded in fixing a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the range of a cannon shot (when it is made the test of territorial jurisdiction) at three miles. So generally is this rule accepted, that writers commonly use the expressions of a range of cannon shot and three miles as equivalents of each other. In other cases, they use the latter expression as a substitute for the former." Further, Mr. Fish, Secretary of State, on 1st December, 1875, writes to Mr. Boker as follows:—"There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coast, as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law, which limits its maritime jurisdiction to a maritime league from its coast. We should particularly regret if Russia should insist on any such pretension." Cf. Wharton's *Digest*, § 32, I., p. 106. The reader will observe that the former quotation refers to a date before the Transfer of Alaska to the United States; and that the latter quotation refers to a date subsequent to that Transfer. Again, Wharton, *Digest*, § 159, II., p. 270, quotes as follows from Mr. J. C. B. Davis's *Notes*, a passage from Mr. J. Quincy Adams's *Instructions to Mr. Henry Middleton*, on 22nd July, 1823, namely, "The pretensions of the Imperial Government

extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude on the Asiatic coast, to the latitude of fifty-one degrees north on the western coast, of the American continent, and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast. The United States can admit of no part of these claims. . . . They can in no wise admit the right of Russia to exclusive territorial possession on any part of the continent of North America south of the 60th degree of latitude. They will maintain the right of their citizens, enjoyed without interruption since the establishment of their independence, of free trade with the original natives of the north-west coast throughout its whole extent." Lastly, Wharton, *Digest*, § 309, III., p. 62, remarks that "It is sufficient here to state that the joint rights of Russia and the United States to those waters are now held by the United States." Of course, he must mean such rights as can be upheld by the Law of Nations.

Discussion of Questions raised in this Article.

From an International point of view the questions which have to be solved in reference to the facts already laid before the reader are very simple. They are these:—1. Is the Behring Sea a *mare clausum*? 2nd. Have the United States the exclusive right of fishing in the Behring Sea? On the facts, and on the Law of Nations applicable to the facts, I unhesitatingly answer these two questions in the negative. 1st. The Behring Sea was never recognised as a closed sea at the time when Russia had possession and dominion over Alaska, since conveyed with all its rights to the United States. No doubt Russia claimed and alleged that it was a closed sea; but her claim was never acknowledged by any one of the Great Powers. Indeed, her claim was opposed by no Power more strenuously than by the United States.

2nd. I have put the question of right as if the problem referred merely to the right of fishing in the Behring Sea, but the question is of much wider range than that. If the United States have the exclusive right of fishing in the Behring Sea, I do not see why their rights should not extend to an exclusive right of navigation and commerce in that sea. The important point, however, is that the United States, as I have already shewn, have, as a nation, been clear and pertinacious about the assertion of the three mile limit, and therefore they should be as ready to recognise it themselves as to enforce it against others. No peculiar or exclusive privilege, such as was indicated by Mr. Secretary Seward to Mr. Tassara, has been proved in regard to the Behring Sea. The conclusion, therefore, at which I arrive is that none can be put forward. For the United States, under the Treaty of sale by Russia to them in 1867, or under any other legal or international right, to claim dominion over all the waters specified as conveyed in that Treaty, between, and as being within, the sea-board of Alaska and the annexed Islands is as untenable as it would be for Great Britain to claim the Atlantic between Great Britain and Canada, or the dominion over the waters between Great Britain and Gibraltar. The consequences of these conclusions are—(1) That the United States ought to grant compensation for the injury done to our Colonial fellow subjects; and (2) That they ought freely to offer this country an apology for the injury done to the national flag, which is the symbol of our national existence and power. The United States have no right, National or International, to exclude all or any persons from fishing, or navigation, or commerce in the Behring Strait or Behring Sea, unless in so far as they can exercise jurisdiction and dominion over the waters there under the general Law of Nations. The Alaska Commercial Company, their lessees, can have no greater rights than the United States of America, the

lessors. Further, so far as the United States Government can be justified in their illegal and masterful conduct in the North Pacific, on the ground that they were preventing the destruction of the seals in that sea, I have to state that, if the Behring Sea Fisheries are open to the world, as I contend they are, and believe I have proved them to be, the United States Government cannot enforce a regulation of such Fisheries according to their views, or by making sham and illegal seizures of British ships on the High Seas. No American vessel, public or private, can seize British vessels engaged in fishing on the High Seas. Possibly, the British-Columbian sealing vessels may, in the opinion of Judge Sawyer, be engaged in robbery and piracy. But, in the eyes of International Lawyers and Publicists, American as well as British, they were not so engaged in the cases to which I have referred.

Conclusion.

Various rumours have been spread about in regard to the attitude of the Dominion of Canada and of the British Government and of the United States Government. All of these rumours are more or less mere guesses. I do not propose to enter into the region of conjecture on this Legal question. But I have no hesitation in stating that it is desirable, in the highest degree, that the two great friendly Powers concerned in these dangerous disputes should, at once, enter into friendly negotiations, for the purpose of arriving at an early settlement in regard to the North-Atlantic Fisheries, as well as the Behring Strait and Sea Fisheries. Such negotiations could not fail to bear good fruit and redound to the honour of both countries. The victories of Peace are no less honourable than the victories obtained in war, and are generally more enduring. My hope is that the Statesmen of Great Britain and of the United States will speedily have a right to claim

a lasting crown of glory by the settlement of grave questions which have threatened to involve both countries in the horrors of war, and are still embittering their friendly relations with each other. The time is opportune for negotiation and settlement of these matters. The dignity, the interests, and the friendly relations of the two great friendly Powers urge that a settlement, which would be supported by the enlightened public opinion of both countries, should be made without delay.

ALEXANDER ROBERTSON.

V.—THE INTERNATIONAL LAW OF THE UNITED STATES. I.*

AT a time when the questions at issue between Great Britain and the United States depend so largely upon the interpretation which the Government of the latter country now puts upon doctrines of International Law on which documentary evidence shews that it formerly took a very different line, the examination of Dr. Wharton's valuable *Digest* becomes a matter of special interest alike to the Jurist and the Diplomatist.

It will be obvious that such an examination might be conducted on partisan lines, in which case it would really be superfluous, because the mere partisan adheres to his party through evil report and good report, and needs no confirmation from books and documents. With such a mode of treating Dr. Wharton's subject, we could have no sympathy, even if we thought it of use, which we do not.

* *A Digest of the International Law of the United States, taken from Documents issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General.* Edited by FRANCIS WHARTON, LL.D. Washington: Government Printing Office. 1886. 3 Vols.

Our sole object will be to discuss some few of the many points of enduring interest which crowd the pages of Dr. Wharton's volumes. More we could not hope to do, in the case of a work covering so vast a field, short of producing its equivalent in length in the pages of this *Review*. Less we could not well do, without failing in the respect due to Dr. Wharton's eminence among the Publicists and Jurists of the New World.

The book is, from the very excellence of its plan, a somewhat peculiar one, in so far as that it does not, like other works published by Dr. Wharton, at all necessarily represent the views of the learned compiler. It is a Digest, not a Treatise. We do not open its pages to know what Dr. Wharton's view may be on a particular point of the Law of Nations, but to know what are the views which Presidents and Secretaries of State and other high American officials have from time to time laid down as being the view for which their Government contended. Herein lies the unequalled value of the book. It is a treasure-house of the doctrine of the United States on questions of International Law.

Besides this purely official enunciation of doctrine, Dr. Wharton has very naturally, and indeed, we think, unavoidably, cited the opinions of Publicists, as bearing on the subject-matter of his book, so that we may turn to it with nearly as much confidence for the views of Grotius, Vattel, Wheaton, or Twiss as for those of the American Government. The illustrations from Publicists are, of course, ancillary to the main purpose, and are therefore given briefly and by way of reference; still, they add to the value of the work as a whole, and we do not entertain any doubt that Dr. Wharton acted judiciously in giving them a place in his scheme. Fortunately, the resolution of Congress under which he acted gave him fairly wide scope by placing the work ordered to be done under his "editorial super-

vision," and this language the learned Editor construed to admit of his throwing these valuable side-lights upon his text.

The list of writers whose works are cited by Dr. Wharton is in itself an instructive document. It may, perhaps, serve to suggest to our own countryman, the learned Editor of, Chancellor Kent's *Commentaries on International Law*, His Honour Judge Abdy, that his ancestor, Dr. Rutherford, once a well-known authority, through his *Institutes of Natural Law*, is not yet so utterly consigned to the "limbo of forgotten writers" as the English editor of Kent's *Commentaries* would seem to have thought in 1875. It is, indeed, difficult to fix a time when a given Publicist may safely be consigned to such a "limbo." His views, to-day apparently antiquated, may to-morrow, through some curious turn of the wheel, once more become popular, or at least be once more brought to the front. Or it may be held, that though his mode of arriving at his conclusions was unscientific, the conclusions themselves are sound. And, in some cases, the very fact that the world in general has arrived at totally opposite conclusions may serve to prevent a writer from falling into oblivion.

Few things are more curious to watch than the ebb and flow of public opinion, and there are few points on which it is less safe to dogmatise than the extent to which an author may be consigned to "limbo." The first volume opens with the discussion of Territorial Sovereignty, and with citations from Judgments of the great Chief Justice Marshall, including that in the *cause célèbre* of the *Schooner Exchange*. This discussion includes the question, so important in its consequences to the United States, of Discovery and Settlement and the titles arising therefrom. These questions were raised between Great Britain and France, and continued between Great Britain and the United States. Mere discovery often gives rise, as was seen

during these controversies, to very conflicting claims. It is often difficult, and sometimes perhaps actually impossible, to say who first discovered a particular district or river or island, in a case like that of the Far West, where hunters and trappers and *voyageurs* were pushing their journeys yearly further and further from the settled country in quest of something more like virgin soil for their pursuits. It is more easy, therefore, to fall back upon discovery combined with settlement as completing the title. This is but going back to the Roman doctrine of *Occupatio*, which furnished Grotius with his rules for the case of newly discovered lands. Of course, the Red Man was, it must be admitted, the first Occupant, or at any rate the first Occupant of whom we have historic knowledge, and with whom we have to deal. The nations of the Old World, when they came into conflict with the Red Man as first Occupant, admitted that a title could be derived from him, but considered their own title by discovery, as they called it, that is, of course, in a purely limited sense, as meaning discovery from the point of view of the Old World, was superior, and that the Red Man's title was a limited one. The notion, at bottom, was the same with the Roman Catholic and the Protestant Powers of Europe. The Pope divided the New World, as good seemed to him, in the interests of the Roman See, and those Powers which at the Reformation ceased, in the language of Boniface VIII., *subesse Romano Pontifici*, and thereby forfeited their corporate salvation, paid no heed to the Papal Bull of division. It was a case of diamond cutting diamond, and long and sharp was the conflict resulting from the breach of Unity in the Sixteenth Century.

The Europeans, whatever their Religious Confession, in fact treated the lands of the Red Man and of the Aztec or Inca as *res nullius*. They practically considered themselves the first Occupants, and yet they sometimes condescended to purchase a title from the native of the soil. Their

conduct was, in fact, not consistent. At least, so it appears to us. If they had steadily refused to seek or acknowledge any rights derived from *graft* by the natives, they would have stood upon firmer ground. As it is, their intercourse with the natives presents to our mind the aspect of vacillation. The Indians, to use a generic term for the inhabitants of the New World, either could or could not give a title. If *Discovery*, as the Europeans called it, on the part of the White Man gave him a superior title, or if the allegation that he took possession of the lands of the Indian with a view to his Spiritual good, by converting him to some form of Christianity, gave a superior title, then there was clearly no use in pretending to accept the sham title which, *ex hypothesi*, would be all that the Indians could give. But the Europeans, in various parts of the New World, undoubtedly combined these several titles, as though each were of equal validity. This was a contradiction, though the fact that it was such probably did not enter into the minds of the Papal and Royal grantors of vast territories in the New World, or into the minds of the grantees. Doubtless, the grantees were not very particular as to their title: they relied, in fact, more upon their swords than their parchments, though they were ready to flourish the latter in the eyes of any Europeans other than their own countrymen, and of course each side in the Religious Camps into which the Old World was divided steadily refused to recognise a title given by the other. If they were to convert the New World, it must be somewhat after the fashion of Thangbrand, Olaf's priest, in Iceland, who laid about with might and main.

President Woolsey, in his *Introduction to the Study of International Law*, § 55, remarks upon the vagueness of the title by *Discovery*. "How much extent of coast," he asks, "or breadth of interior went with the discovery?" That,

of course, is just the question which, in point of fact, will be found by reference to such a book as Dr. Wharton's *Digest* to have been perpetually coming to the front, and sometimes, too frequently indeed, there has been no answer found short of war. The claims made were generally exceedingly wide, as well as what President Woolsey calls them, "exceedingly vague." England and France, in the New World, as Mr. Secretary Calhoun wrote to Mr. Fisher, in 1844, fitted out voyages of discovery, and made settlements on the Eastern coast of North America. "They claimed for their settlements, usually, specific limits along the coasts and bays on which they were founded; and, generally, a region of corresponding width extending across the entire continent to the Pacific Ocean. Such was the character of the limits assigned by England in the charter which she granted to her former colonies, now the United States, when there was no special reason for varying from it. How strong she regarded her claim to the region conveyed by these charters and extending westward of her settlements, the war between her and France, which was terminated by the treaty of Paris, in 1763, furnishes a striking illustration." Apart from the slight inaccuracy of diction by which it is made to appear here that a single Charter governed the whole of the British Plantations in the New World, which was probably a slip of the pen, this language of Mr. Calhoun fairly sets forth the general character of the extremely broad limits which all European nations were united in giving to the discoveries made by their respective subjects. These limits were only reached on the shores of the Pacific, because it was practically impossible to carry them further. As for the natives, it must be admitted with President Woolsey (*op. cit.* § 55), that "very little account was taken" of them. "Being heathen," as he remarks, "they were not, in the age succeeding the discovery of America, regarded as having rights,

but might be subdued and stript of sovereignty over their country without compunction. And yet when the right to territory in the New World was in dispute, a title derived from them, it might be, to soil far beyond their haunts, would perhaps be pleaded against prior occupation." The natives, in fact, were treated pretty much as pawns on the chessboard of European Colonisation. They were moved, made use of, sacrificed, as best seemed to suit the interests of the White Man. For one who, like Penn, sincerely desired to deal justly by the Indian, and respect his original title to the land, and base the European title on native cession as well as on Royal Charter, there were hundreds, of the principal European nations, who never gave a thought to the question of Justice as between them and the Red Man. This is to be regretted, but it is the real history of the relations between the two races on the American Continent, and it is not confined to the relations between what are called highly civilised races and those of a lower civilisation in the New World. "The rights of the natives," says Mr. Lawrence,* "were subjects of controversy among publicists and theologians, but in practice they were habitually disregarded."

While not proposing to touch here upon the main questions now pending between this country and the United States with regard to the Atlantic and Pacific Fisheries, which have been so fully discussed by Mr. Alexander Robertson in the pages of this *Review*, it may not be without interest to remark *obiter* upon the language of President Pierce on the *mare clausum* theory, when attempted to be enforced upon the world by the tax known as the Sound Dues. The President said in his Third Annual Message, 1885, as cited by Dr. Wharton (*op. cit.*,

* *Essays on Some Disputed Questions in Modern International Law.* By T. J. Lawrence, M.A., LL.M. Cambridge and London. Second Edition. 1885. Page 198.

§ 29, Vol. I., p. 77), "I remain of opinion that the United States ought not to submit to the payment of the Sound Dues, not so much because of their amount, which is a secondary matter, but because it is in effect the recognition of the right of Denmark to treat one of the great maritime highways of nations as a close sea, and prevent the navigation of it as a privilege, for which tribute may be imposed upon those who have occasion to use it."⁸ And substantially identical language is found to have been held by Mr. Secretary Fish in his instructions to Mr. McVeagh on the question of the Ottoman claim to exclude ships of war from the Dardanelles.

This claim, the American Secretary of State was careful to lay down, was one which the President deemed it important to avoid recognising "as a right under the Law of Nations." The American Government, said Mr. Fish, "had observed the acquiescence of other powers whose greater propinquity would suggest more intimate interests in the usage whereby the Porte claims the right to exclude the national vessels of other powers from the passage of those straits." The similarity of the position of Turkey with reference to the Euxine and of Denmark with reference to the Baltic, did not escape the notice of Mr. Fish, which is an additional reason for our referring to both questions in this place. The difference was and is, as Mr. Fish pointed out, rather in favour of Turkey, as being "sovereign over the soil on both sides of the straits, while Sweden owns the territory on the east of the Sound leading to the Baltic." Nevertheless, there were and are certain considerations which seem fairly to weaken the *prima facie* strength of both the Ottoman and Danish claims, inasmuch as "the Black Sea, like the Baltic, is a vast expanse of waters, which wash the shores not alone of Turkish territory, but those of another great power, who may, in times of peace at least, expect visits from men-of-war of

friendly States. It seems unfair that any such claim as that of Turkey should be set up as a bar to such an intercourse, or that the privilege should in any way be subject to her sufferance." And throughout the correspondence, cited by Dr. Wharton, between Mr. Secretary Fish and the Representative of the United States at the Sublime Porte, the American Secretary is careful to insist that the United States are "not a party to the convention which professes to exclude vessels of war from the Dardanelles," and that "a proper occasion may arise" for the American Government "to dispute the applicability of the claim to United States men-of-war.". Any present acquiescence in the claim is rested entirely on grounds of expediency, and respect for the "traditional sensibility of the Porte" as to the Dardanelles. Similarly, the freedom of the Straits of Magellan is strongly insisted upon by Mr. Secretary Evarts, in his instructions to Mr. Osborn, in 1879, when Mr. Evarts said that "the Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through these straits."

Thus, it would certainly seem from the well sustained identity of language held by former Presidents and Secretaries of State that the historical tradition of the United States is in favour of that very freedom which is contended for by Mr. Robertson in his articles on the Atlantic and Pacific Fisheries Question in the pages of this *Review*, and that even if we take only the narrowest issue that can well be raised on the Pacific side, viz., that concerning the Fisheries in Behring Strait, as distinguished from the broader question of the Behring Sea, which it is submitted is clearly a part of the Pacific Ocean. This historical tradition seems worth bringing out, for there ought to be

some value in a tradition in Diplomacy, and there should be more than ordinary value attaching, under a Republican Government, to a Tradition in favour of Freedom. We can only hope that the present appearance of a break in this Tradition may prove not to be such in reality, and that the words written some years ago by the then Deputy Whewell Professor of International Law in the University of Cambridge (*op. cit.*, p. 137), may be as true of the Government of the United States as we believe that they are now of the Governments of Europe, that the "old claims to exclusive sovereignty over vast tracts of open ocean have been expressly or tacitly withdrawn for generations past," and that "no sea is now a *mare clausum* unless it is practically an inland lake, entirely surrounded by the land territory of a single State."

VI.—CURRENT NOTES ON INTERNATIONAL LAW.

Expulsion of Aliens.

ONE of the most interesting discussions at the Lausanne meeting of the Institute of International Law, as recorded in its recently published *Annuaire* for 1888-1889, was that which arose out of a very able paper by M. Rolin-Jacquemyns on the subject which forms the heading of the present Note. The Resolutions finally adopted by the Institute differed very considerably from those originally submitted to it by the proposer, and we must confess that they savour too much of theory to be of much use to the practical student of the Law of Nations. The original propositions of M. Rolin-Jacquemyns, however, do, we venture to think, represent very accurately the actual rules of International Law as at present existing on this much vexed subject.

Briefly summarised they may be stated as follows :—

(a.) States have a general absolute right to admit or exclude aliens at discretion.

(b.) In the absence of declared war, however, the expulsion of a whole class of aliens cannot be justified except on the ground of Reprisals ; and, even if war exists, such a step would not be justified except on the ground of reprisals or of urgent necessity.

(c.) In any case, expulsion of foreigners, without any apparent cause, will always be reasonable ground for the foreign State to demand an explanation ; and such expulsion should not, as a rule, take place without reasonable notice or delay.

(d.) As regards the uncontrolled right of a State to admit aliens to its protection, this is in practice subject to two limitations, viz. :—(1.) The obligation to extradite criminals in certain cases ; and (2.) The reasonable right which one State has of requiring another friendly State not to allow its territory to be made a basis of active and overt conspiracy against the welfare of the former.

In view of the gravity of the question, it seems well that the Declaration ultimately adopted by the Institute should be appended. It consisted of the following Articles :—

1. According to theory every Sovereign State can regulate the admission and expulsion of aliens as it thinks fit, but International comity renders it desirable that aliens should have notice of any general rules on which the State proposes to act.

2. Except in urgent cases, such as war or serious troubles, a distinction must be drawn between ordinary expulsion, applying to specific individuals, and extraordinary expulsion, applying to whole classes of persons.

3. Expulsion in case of urgency should be temporary only. It should not last longer than the duration of the war, or a period fixed in advance, at the expiration of

which it should give way to the usual rules of ordinary and extraordinary expulsion.

4. Extraordinary expulsion should be effected by special law, or by decree previously published. Any such general decree should be published a reasonable time before being carried into execution.

5. As regards ordinary expulsion, a distinction should be drawn between individuals domiciled or having a place of business in the country in question, and those not fulfilling either of these conditions.

6. Notice specifying the grounds of a decree of ordinary expulsion should be served on the individual concerned, before being carried into execution.

* * *

Lex Loci Contractū.

À propos of the case of *In re the Missouri Steamship Co.* (58 L.J. Ch. 72), recently decided in the Court of Appeal, and referred to in the last issue of this *Review* (p. 370), a very similar question was considered a few weeks earlier by the Supreme Court of the United States in the case of *The Liverpool Steam Co. v. Phœnix Insurance Co.* (9 Sup. Ct. Rep. 499, affirming same case, 22 Fed. Rep. 715.)

The point at issue in each case was as to the Law applicable to a contract of affreightment; the question being rendered important by reason of the fact that a limitation of liability for loss caused by perils of the sea is invalid by American Law, though allowed by that of our own country.

The U.S. Supreme Court held that the American Law applied, basing its decision largely on the fact that the Bill of Lading was made and dated at New York by an agent of the English Company residing there.

The decision certainly seems, at first sight, to be a retrogression from the modern tendency to make the intention of the parties, as deducible from all the circumstances of the contract, the sole criterion of the law applicable. It

would appear that the ship's flag was English, its owners were an English Company, and the goods were shipped to an English consignee at an English port. On the other hand, it is true that these facts were not indicated in the Bill of Lading, and that the shipper was an American, so that perhaps we may not be altogether justified in assuming that the decision was entirely out of harmony with the tendency of modern cases.

We may observe, with reference to this subject, that our contemporary, the *American Law Review*, (Vol. XXIII., No. V., p. 841), pours out the vials of its wrath on our own Court of Appeal, for what it terms their "thoroughly stupid decision" in the *Missouri* case.

Apart from any consideration of the unusually strong language in which the attack is couched, its injustice is apparent on the surface. The Court of Appeal did not base their conclusion as to the intention of the parties on the mere fact that "the contract was to be performed in England," as is suggested by our American contemporary, but on the concurrence of several very definite circumstances, all indicating English Law as that which was intended to apply. This was concisely expressed by Lord Halsbury, L.H.C., when he said "The contract is a contract for conveyance of cattle by sea, in a British ship owned by a British company, domiciled in England, to a British port. That, however, is not conclusive, but I look at the contract itself, and finding the ordinary exceptions to a British bill of lading, I come to the conclusion that the parties did contemplate British Law as that by which the contract was to be regulated."

We fear that our contemporary must have based its adverse criticism on a slender acquaintance with the facts of the case, and a still scantier appreciation of the grounds on which the Judgments were based.

J. M. GOVER.

Quarterly Antes.

The Home Secretary and the Prerogative of Mercy.

The points which we anticipated in our last issue would be taken by the Public on the occasion of the recent *cause célèbre* at Liverpool have been duly taken, we observe, at any rate in Scotland. Thus we read in the correspondence columns of the *Dundee Advertiser*, for September 24th, that the review of the case by the Secretary of State for Home Affairs is considered "extraordinary" and "possibly illegal." For its legality, it may be presumed that the Secretary will consider his Constitutional duty of advising the Crown in the matter of the exercise of the Prerogative of Mercy a sufficient warrant, even in answer to a threatened question in the House of Commons. For the allegation that this duty is of an "extraordinary" character, there is more to be said, inasmuch as it practically makes the Home Secretary, in his official *persona*, a Court of Review of the Judgments of a Court of Assize in capital matters, although there is no Appeal *eo nomine* in Criminal cases. This is undoubtedly a very serious responsibility to throw upon an officer of State; but as long as the establishment of a Court of Appeal in Criminal cases is withheld, some such course seems unavoidable, if the Prerogative is to be maintained. Of course there are varieties of Prerogatives, some more in accordance with the spirit of the Constitution than others. Some alleged Prerogative rights still maintained, at least in theory, are so visibly tainted with reminiscences of Absolutism that they seem difficult, if not impossible, to conciliate with the reign of Law under a Limited Monarchy. But Mercy is equally a Prerogative of the Chief of the State under so-called Republican Governments, and it is incon-

ceivable that it should be given up under a Monarchy. We may therefore dismiss any such idea, if entertained at all, as chimerical. It remains for us to consider how far the present mode of exercising the Prerogative is either the best that could be devised, or the best under present circumstances, or again, in what direction, if at all, it could best be amended.

The present mode of exercising the Prerogative is certainly open, *prima facie*, to much criticism. The spectacle at which writers of letters to newspapers are sure to gird is that of a private individual overruling the verdict of a Jury, that individual himself not being even necessarily one who has had a legal training. He may, indeed, be a *Historicus*, or he may be, as in the present Administration, one of Her Majesty's Counsel; but these are accidents. Anyway, he revises Judge and Jury alike, and either confirms what might seem to need no confirmation, or reverses what would, but for his existence and the attributes with which he is officially clothed, be irreversible. Consequently, the British public is excited, and feels trampled upon in the persons of the Liverpool Jury, whose verdict, acquiesced in at the time by so eminent a Judge as Mr. Justice Stephen, has thus been set aside. What then shall be done to appease the irate Public? Shall the Home Secretary be impeached of High Treason against His Majesty the People? Shall the Royal Prerogative of Mercy be abolished by statute? or shall a Court of Criminal Appeal, or a Court of Cassation be instituted? The first two suggestions, we think, may be dismissed in any calm and serious review of the subject. The third remains open to discussion.

Singularly enough, it may seem, the question of the desirableness of instituting a Court of Appeal in Criminal cases is one on which opinion is much divided in the Legal world, as far as the United Kingdom represents that world. Continental nations have to a certain extent,

we think, cut the knot by their Courts of Cassation. It may be that such a course would meet the substance of the demand now made. But these Courts leave the Prerogative of Mercy inherent in the Chief of the State untouched. So it may be permissible to doubt whether, under any of the various possible solutions of the problem, we should really get quit altogether of the "extraordinary" Tribunal of the Home Secretary, or of some analogous official, though we might have one with a more Legal title. For we presume that if the President of the French Republic or the King of Italy has before him a capital sentence for consideration, all the facts of the Trial and Judgment are placed before the President or the King by his Minister of Justice for the time being, who with such facts also lodges a statement of the advice which as Minister he feels bound to offer. It is then, we apprehend, competent to the Head of the State to accept such advice or not. The Minister would hardly be likely to take its non-acceptance as a vote of want of confidence, the matter being one, *ex hypothesi*, non-political, and therefore the final decision would really rest with the Head of the State, to a greater extent, perhaps, than with us.

But our Secretary of State for Home Affairs scarcely seems to be the equal, technically at any rate, of a Minister of Justice. At least, he does not appear to us to be such. What he may appear to the Legal world in general, or to the Public at large, we do not profess to know. We are only speaking of things and people as they appear to us. Perhaps if our Home Secretary were to be decorated with the title of Minister of Justice, or of Grace and Justice, he would loom more grandly and more fitly before the British Public as the dispenser, practically, of the Prerogative of Mercy, and his acts in such capacity would be less likely to be questioned. It might perhaps be an alternative to the suggested appointment of a Court of Criminal Appeal,

the desirableness of which is seriously questioned, and it might be worthy of consideration as such. We do not go the length of ourselves suggesting this magnifying process as one desirable of application, we only throw out the idea, to be taken up or not according as it may happen to chime in with the notions of those who have joined in some of the varied cries to which the Maybrick case has given rise. *

Another question which we pointed out as likely to be raised by this case, viz., the propriety of introducing the Scottish verdict of "not proven," in point of fact, does not properly arise out of this case at all, for there is not, as far as we were able to see at the time from notices in the Press, the slightest warrant for doubting that the Jury in the Maybrick case were really as well as nominally unanimous. Personal opinions against the retention of Capital Punishment had no weight in the matter, for a Juror who admitted holding such views also said that he considered them to be outside his duty as a Juror, which was to give a verdict in accordance with the Law as it is. And herein such Juror was clearly, to our mind, honest as well as right. For he and his fellows had to deal with Law as it is, not as it might, could, would or should be.

* * *

The State and Modern Private Life.

The subject treated in the current number of this *Review* by our valued colleague, Mr. James Williams, is one full of interest and importance in relation to Modern Life, as well as to that of Imperial Rome. It so happens that the modern aspect has been touched upon in an interesting Paper in the *Journal des Savants* for January last, by M. Ad. Franck, of the Institute, on the Principles of Law, in the course of a criticism of a recent work on that subject by M. Emile Beaussire, of the Institute. The Paper is so

largely critical; indeed, that nothing short of reproduction in our language could shew the whole of the line taken by M. Franck.⁶ M. Beaussire criticises Bentham, Mill, and Littré, and M. Franck criticises M. Beaussire. We may return to this somewhat complicated network of criticism on a future occasion, in regard to the main question as to the true Principles of Law. What we wish just now to take up is only that portion concerned with the State and Private Life in Modern Times.

Reduced to their most general expression, says M. Franck, the various opinions to which the question of the attributes of the State has given rise in Modern Times are three:—

(a.) These attributes are reduced to the assuring to the individual the possession of his goods and the security of his person, together with the defence of the country against external aggression, and such public works as make communication safe and easy. This is the view of the majority of Economists, at least of those who profess the old maxim, "Laissez faire, laissez passer." It is also the opinion of certain Jurists who, distinguishing between interests and rights, think that the State should confine itself to causing every citizen to be respected in his rights by itself setting the example of that respect, and who hold that the State is not bound to protect any interests save those of National Defence.

(b.) According to others, on the contrary, the rights, duties, and even interests of the individual are absorbed and merged in those of the State. The State, so understood, is the only proprietor, the only undertaker of public and private works, the only artisan, the only merchant, the only organiser of Intellectual works as of those which relate to Material Life. In this conception, the individual can be nothing but a functionary, in health, or a pensioner, in illness. To each individual the State would assign his task, his remuneration, or his place as an invalid. This

opinion is presented to us in its fullest expression as Socialism. All Socialist doctrine does not go so far, but that is the goal to which it is forcibly drawn by its principles.

(c.) Lastly, there is a third opinion, according to which the State, while causing the rights of the citizen and of Society to be respected, and leaving every one free to look to his own interests according to his intelligence and his powers, has a different task to fulfil. This task consists in satisfying, by means of Public Institutions, those sentiments and needs of the higher order which, if left to private initiation, would run the risk of losing their strength, or even of being altogether lost, and in giving an impetus, and lending its assistance to those nobler faculties which are the glory of a Nation and of the Human race.

This third opinion is of no school or party; it is that which, in practice, is followed, this long time past, by the Governments of all Civilised Nations, whether in Europe or the New World. "Except among Barbarians," adds M. Franck, which seems a little hard, as though hinting at the possible presence of Barbarians in the midst of Civilised Communities, though we are not sure that this is the under-current of his meaning. To this third opinion M. Beaussire declares his adhesion, but, in M. Franck's view, somewhat too narrowly. For outside the rights which the State is bound to defend, says M. Franck, and the interests which it is bound to protect, there are legitimate channels for the exercise of State influence, and this chiefly in the field of Intellectual labour, which is often, he thinks, too vast and too costly a field to be worked either by individuals or by combinations of individuals.

Who but the State, asks M. Franck, would undertake the cost of distant exploration for an exceptional occurrence in Astronomy or Physics? Who but the State would found and endow chairs of Sanskrit, of Zend, of Egyptology,

Assyriology, all things of no advantage to the well being and the wealth of Nations?

There is an answer to this question, in our own country and in the United States, at least. Who, we may ask, founded and keeps up the Dunecbt Observatory in Scotland, and the Lick Observatory in California? In each case the answer is, private enterprise, the devotion of individuals to Science. Who, we may ask, founded the Boden Professorship and Scholarships in Sanskrit, the Taylorian Professorship and Scholarships in Comparative Philology and Modern Languages, the Corpus Professorship of Jurisprudence, the Bampton and the Hulsean Lectureships, the Slade Professorships of Fine Art, the Chichele and Whewell Professorships of International Law, to take but a few salient examples from the two ancient English Universities? The answer is still, private enterprise, the devotion of individuals or of combinations of individuals to the cultivation of special branches of knowledge. And what, we may ask, are the ancient Universities themselves, whether in this country or on the Continent, but similar cases of private enterprise, eventually acquiring Papal, Imperial, or Royal favour? With these and many more examples before us, in the New World not less than in the Old, we are not afraid of leaving such matters to private enterprise. We have no desire to put the State out of court. Let the State, too, come forward, as it most usefully may, and give a helping hand to Literature, to Science, to Art, but do not let us sit down and say, these matters are too high for us. That was the language of cautious men in days when Constitutional Law was being set at defiance by Kings trained in high notions of Prerogative. Such an answer, however, would never have saved the Constitution, and it would not avail any more for the promotion of the study of those branches of Science which M. Franck thinks too high for anything short of State patronage. There are other and even perhaps

more interesting problems connected with this question, to which we may return in a future issue:

Reference to Authorities in Legal Works.

The doctrine set forth in Legal works requires to be supported by decided cases, even where the book is styled, as Mr. Cababé has styled his *Principles of Estoppel* (W. Maxwell and Son), an "Essay." To give only 79 cases—the reason alleged being that his work is not a collection of cases and consequently he only refers to authorities in so far as the decisions establish or illustrate principles, is not a satisfactory course. We contend that in a law book, authority should be given for every statement which is made, or else it is useless to the practitioner. But, on page 17, on Estoppel between landlord and tenant we find statements of the law which continue till page 21, without a single reference or allusion to the place where to find the authorities for the statements which the author makes. Again, on page 26, we read that "if a party already in possession, recognise as landlord one who neither gave him possession, nor is the successor in title to one who did so in ignorance of facts which would have shown that the party claiming to be landlord had in fact no title, which facts were either withheld from him by the party so claiming, or were equally unknown to both, such recognition, whether it take the form of an attornment, a payment of rent, or the entering into a new agreement, will not preclude the party in possession, on subsequently discovering the want of title, from refusing to regard the other party any longer as his landlord." Now a *dictum* of this description requires more than the bare assertion of an author. No doubt it is correct, but we may reasonably wish to know whether it is the Statute Law or the Common Law which makes it so—and what Court

or Judge, if any, settled the point. It is unfortunate that the same fault runs all through the book, for, as a whole, it is clearly and pleasantly written, and accurate as far as we have been able to test it. Such a volume may be useful to students, to give them an outline of the subject, but it cannot be a help to the practitioner by reason of the fault above mentioned, which we trust Mr. Cababé will see his way to correcting in his next edition. *

Reviews.

Principles of the Law of Negligence. By THOMAS BEVEN, of the Inner Temple, Barrister-at-Law. Stevens and Haynes. 1889.

Those among our readers who have read with interest a careful article on *Volenti non fit injuria* which appeared in this *Review*, for November, 1887, will not be surprised to see the intricate subject of Negligence comprehensively dealt with in a work by the author of that article. We were not without text-books on Negligence before, but there was clearly room for another. In the first place, one or two of the most important existing books are American, and can therefore only be useful for occasional reference in England. The others are only small books; and, though two of them have established their position by passing into second editions, they cannot be said to have completely occupied the large extent of ground which Mr. Beven's weighty volume claims as its own. At present we can only deal cursorily with this important work, but we hope ere long to submit it to a closer analysis than our space will afford at present. In the meantime there is little risk in asserting that it is likely to become the principal English text-book on the Law of Negligence, since the thorough way in which each detail of principle is worked out gives it an indisputable claim to such a position, always supposing—and this we have no reason to doubt—that the author's accuracy is on a par with his zeal for inquiry.

* A few words may be said as to the *motif* of the book, as explained in the Preface. The author begins by quoting

an epigrammatic remark about prefaces from Sir Roger L'Estrange:—

“‘ Most Prefaces are effectually apologies, and neither the Book nor the Author one jot the better for them. If the book be good, it will not need an apology; if bad, it will not bear one; for where a man thinks by calling himself noddy in the epistle to atone for shewing himself to be one in the text, he does, with respect to the dignity of an Author, but bind up two fools in one cover.’ ”

But Mr. Beven avoids this stultification, for his Preface is not an apology; it is rather an explanation of his method and object. He tells us truly that he aims not merely at collecting authorities, but at discussing them. Thus, for instance, the rather wide view of responsibility enunciated by Brett, M.R., in *Heaven v. Pender*,* objected to by Cotton, L.J., but approved by Hawkins, J., and by several writers of text-books, is the subject of a lengthy disquisition; and the maxim *volenti non fit injuria*, which the author had in a manner made his own before, is also treated very fully. The author, while fully stating other people's views, freely puts forward his own; and in this he is wise, for writers who are too diffident to act thus do not really discuss but only record. It remains, of course, to be seen whether his opinions will have influence; his own idea is that this is a question of secondary moment, because, even if his conclusions are wrong, the reader has, in the authorities set out and cited by him, all the requisite materials for arriving at more accurate views. We take leave of Mr. Beven for the present with a wise and modest piece of advice from Littleton's *Tenures*, which concludes his Preface:—

“‘ And know, my son, that I will not that you believe, that all which I have said in the said books be law, for this I will not to take upon me to presume, but of such things that are not law, inquire and learn of my wise masters learned in the law; nevertheless, although certain things which are moved and specified in the said books are not law, yet such things shall make thee more apt and able to understand the arguments and the reasons of the law, &c. For by the arguments and the reasons in the law a man may sooner arrive at the certainty and knowledge of the law.

“‘ *Lex plus laudatur quando rations probatur;*’ ”

* 9 Q.B.D. 362; on appeal, 11 Q.B.D. 503.

Declaration of War: A Survey of the position of Belligerents and Neutrals, with relative considerations of Shipping and Marine Insurance during War. By DOUGLAS OWEN, of the Inner Temple, Barrister-at-Law. Stevens and Sons. 1889.

This is an interesting and valuable book on an important and far-reaching subject. The primary title, however, although no doubt it strikes the key-note of the Treatise, is only to that extent indicative of the real nature of the work. Declaration of War, as one of the points discussed, is dismissed with brief notice by Mr. Owen, the passages on page 12 being practically all that he devotes to a topic which is yet, in fact, the key-note of his book. For it is the state of things which ensues in Maritime Law after a Declaration of War that is the subject matter of the four hundred pages or so which Mr. Owen gives us. Col. Maurice had already devoted considerable pains to gathering together, on behalf of the Intelligence Department of our War Office, a whole long *catena* of instances in which hostilities have not been preceded by a formal Declaration. Some of those instances, it appears to us, were not very much *ad rem*, and others, perhaps the majority, were not by any means good precedents. Still, we might, we think, have looked for some consideration of Col. Maurice's *catena* of cases, in connection with the act which gives its name to the book now before us. That there should be some notice given, adequate in time, and formal in its character, is to our mind unquestionable. Any other course is, we conceive, contrary to modern Public Opinion as well as to the opinions of Jurists. What the precise nature of such notification should be is, no doubt, matter for discussion. Royal Proclamations and Orders in Council may be held ample notice for their subjects, on the part of the Belligerent Governments. The old functions of the Heralds as *Feciales* are probably extinct, though there seems no more reason against sending Garter to declare War than against sending him to invest a Foreign Monarch with an Order. Custom alone makes the difference. We adhere to the one ceremony and give up the other.

The field covered by Mr. Owen's book may be better judged perhaps by his somewhat lengthy secondary title than by the primary title. It is at once a Treatise on the Maritime *Jus inter gentes* in time of War, and on Marine Insurance during the same period. It is therefore of value alike to the Jurist and to the Underwriter, the Shipping Agent and the Average Adjuster.

Under each heading of International Law which falls within his purview, Mr. Owen groups the principal deductions at which decided cases enable him to arrive in the matter of Insurance. The extremely practical character of the book will thus at once be evident, and Mr. Owen's criticisms are themselves generally of a practical tenor. Those who approach his Treatise mainly from the scientific and Juridical side should be warned at the outset that Mr. Owen uses the term Law of Nations as substantially equivalent to the *Jus Naturale* of olden times, and the term International Law as equivalent to the Conventional *Jus inter gentes*. We regret this decision of the learned author, which we do not think either sufficiently warranted or free from an undesirable element of confusion. When we read that such and such a doctrine or practice is or is not in accordance with the Law of Nations, we are not, now-a-days at least, generally casting our thoughts back into the far Past imagined by the Stoic Philosopher. We are thinking of quite other things, and of present times. Not that Mr. Owen is by any means a dreaming Monk barns. Far from it, he is very modern in his sows and instances. The Greek and Formosan Incidents are cited on the subject of Pacific Blockade, and reference is made in most honourable terms to the able article by Mr. J. M. Gover, on *Some Recent Incidents in International Law* in the *Law Magazine and Review* for February last. But we should have been glad if Mr. Owen had expressed his views more definitely on the Rice question, which might come up again in future difficulties between China and the Western Powers. We apprehend that he would view the line likely to be taken in such a case by Great Britain as decided by our attitude at the time with regard to the claims set up by France.

In the matter of the *Springbok*, Mr. Owen hardly seems to appreciate the very considerable array of opinion among Jurists in a sense diametrically opposed to the decision, or the fact practically acknowledged by distinguished Americans, that the Courts of the United States had not at the time shaken off the effects of the Civil War which had so long divided men into two camps. The widely prevalent conviction that a very different decision would be arrived at now appears to us greatly to invalidate the case as an authority in Maritime Law, if, indeed, it should be considered an authority at all for the main points at issue. Mr. Owen mentions that the absence of her Invoice on board the *Springbok* was remarked upon

by the American Courts as a "suspicious circumstance." Having gone this length it would have been well to have pointed out firstly, that the Invoice is only an admixture of proof, of greater or less importance, indeed, according as other proofs of the character of ship and cargo may or may not be forthcoming, and secondly that as a matter of fact the *Springbok's* Invoice had been posted to the consignee at Nassau, N.P., by the Mail *via* New York, in full accordance with the practice adopted by British shippers at the time. This practice must necessarily be affected by circumstances, and the American Civil War was a circumstance which did affect it in the sense indicated above. The *Springbok* being but a sailing vessel, her arrival at Nassau would in the natural course of events have found the Consignee in full possession of the Invoice, *per* Mail Steamer, long before it could be wanted. It is difficult for any one not committed to a foregone conclusion to see any irregularity in this, or anything justly amounting to a "suspicious circumstance." It might with greater propriety, indeed, be called a "suspicious circumstance" that the *Springbok* should have been entered (though in all probability altogether by mistake as to her presence there) on a "Black List" of vessels "suspected" of having sailed from London with cargoes destined for blockaded ports, under a tonnage enormously exceeding the true registered tonnage, which was only 188 tons, while she was placed on the List at 853 tons.

On the Foreign Enlistment Act, and the severity with which it treats what is, as Mr. Owen says, "not an offence by the common law of nations," we should also have been glad of some criticisms such as the learned author does give us in connection with the Declaration of Paris and the *Alabama* case. The Declaration, Mr. Owen evidently regards as a very doubtful blessing, if, indeed, it be a blessing at all in his eyes, which may be doubted. And the allowing the question of the alleged liability of the British Government to be judged by *ex post facto* Rules, which were admittedly not Rules of the Law of Nations (in our sense, not Mr. Owen's) at the time when the question was mooted, appears to Mr. Owen, as to ourselves, a kind of proceeding not to be recommended for imitation. A few small inaccuracies have caught our eye, which the learned author will no doubt correct in his second edition. Sir Travess Twiss has not written any Treatise entitled "Inter-

national Law," and it is somewhat misleading so to cite his volumes on the "Law of Nations." By a mere misprint, on one occasion, where it is correctly cited otherwise, Sir Travers is made to use language of dubious accuracy as part of his title, which is "in Time of War," not, as erroneously printed by Mr. Owen, "Times of War." We should like a fuller Bibliography in the next edition, which we trust will be called for at an early date. We have but touched the surface of Mr. Owen's interesting book in the present notice, and we hope to be able to return to it at somewhat greater length by-and-bye.

A Treatise on the Law of Partnership. By the Right Honourable SIR NATHANIEL LINDLEY, Knt., one of the Lords Justices of Her Majesty's Court of Appeal, assisted by WILLIAM C. GULL, M.A., of Lincoln's Inn, Esq., Barrister-at-Law, Vinerian Scholar in the University of Oxford, 1883, and WALTER B. LINDLEY, M.A., of Lincoln's Inn, Esq., Barrister-at-Law. Fifth Edition. W. Maxwell and Son. 1888.

We greet with pleasure a new edition of this well-known work. It is now more than ten years since the last edition appeared, in 1878. The main feature of change is the omission of the portion treating on Company Law, which will come out in a separate volume. This makes the book smaller in compass, of course, and is a great improvement. The subject of Company Law is now sufficiently comprehensive to merit more than one Treatise dedicated to it, as has been shewn by Mr. F. Beaufort Palmer and others, and its embodiment with Partnership would make a single work which should attempt to deal with both in their entirety far too bulky. The present volume runs to some 750 pages, and in its compass is to be found every matter and decision of importance in the branch of the Law with which it deals. It is necessary to remark, however, that Cases decided since the establishment of the *Law Reports*, but not incorporated in that series, are not noticed. Important decisions, such as *Kendall v. Hamilton*, 4 A.C. 504, are explained luminously and clearly, and we can detect no omission as to any of those noticed, though we might desire the insertion of some which the *Law Reports* do not condescend to notice. The reversal on Appeal of the decision in *Badeley v. Consolidated Bank*, 34 Ch. D. 536, is noticed in the additions. The points in *Yorkshire Banking Co. v. Beatson*, 5 C.P.D. 109, as to the firm being bound by the acceptances of

one partner, and *Scaif v. Jardine*, 7 A.C. 345, are also duly stated. On p. 359, *Helmore v. Smith*, 35 Ch.D. 436, is referred to in a footnote, the authors admitting that it qualifies, or rather affords an instance of an exception to the statement they make in the body of the work, that the taking of the share of a partner in execution for his debts, operates as a dissolution. If one portion of a work so excellent as a whole, can be considered better than another, we should give the palm to that setting out in detail the usual clauses of a partnership agreement and the remarks following each of the clauses (pages 411-455), which are exceedingly useful to a practitioner drawing a deed of partnership. In the list of cases, the reference to the page in which any case is considered at length is noted by an asterisk, an innovation not yet introduced into most legal works, but the general adoption of which would, we think, be very beneficial. The scheme of the work is to treat first, in Book I., of the Contract of Partnership itself, its general nature, duration, consideration, evidence, who can be a partner and what partnerships are legal or otherwise. Book II. comprises the rights and obligations of partners as regards third parties, and Book III., their rights and obligations as regards one another. Book IV. deals with the winding up and dissolution, its causes and consequences, and also the effects of Bankruptcy of all or any of the Partners. An introductory sketch is given on the meaning of the word Partnership, and how a Partnership differs from corporations and companies. This work, of which the first edition appeared in 1860, has long been the standard authority on Partnership, and is likely to remain so—though Sir Frederick Pollock's smaller Treatise is more appropriate for the student. The present edition maintains the reputation of the distinguished Judge whose name is still borne on its title-page. Whatever part of the volume we may open, we find no statements which do not appear to us clear, well reasoned and supported by weighty authority.

The Green Bag. A Useless but Entertaining Magazine for Lawyers.
Edited by HORACE W. FULLER. C.C. Soule. Boston, Mass. 1889.

Instead of the familiar Blue bag, or the more aristocratic and less familiar, Red bag of modern times, the unfamiliar ensign of the Green bag has been hoisted by a new contemporary of ours in the United States, which defends its choice on memories dating back to that famous sovereign Queen Anne, who, we

believe, has been reported to be dead. We do not much care about the pretty quarrel which has been started on the question of the name of our contemporary. But we think that in its second year, the Editor might well dispense with that part of the sub-title of his Magazine which describes it as "useless." This might sound like affectation on the part of a periodical which is, to our mind at least, quite the reverse of useless. When we consider that such distinguished American lawyers as Melville M. Bigelow, Seymour D. Thompson, Theodore W. Dwight, and Irving Browne, are to be found among the contributors, merely taking at random a few salient names, anybody who has the slightest acquaintance with current American Legal Thought will know at once that some of its ablest exponents help to fill the contents of the *Green Bag*. And the subjects which they illustrate are full of varied interest. Here we may look upon the portraits and read the lives of such Fathers of Jurisprudence, not only in the United States but also in the Old World, as James Kent and Francis Lieber, and here we may read the interesting story of historic American Law Schools like that of Columbia College, New York, where Kent and Lieber lectured, and of similar Schools in the West, like that of the Union College of Law, Chicago, which counts such distinguished modern names as those of Marshall D. Ewell and James L. High.

Some of the biographies given by our contemporary are of interest as pictures of American life and customs in the olden time as well as in these latter days of the Telephone and Electric light. And most of the articles have an applicability to both sides of the Atlantic, though the exact purport is not always on the surface. Thus when we find Mr. Seymour D. Thompson discussing such a subject as *Putting New Wine into Old Bottles*, we might think he had originally intended a delicate satire on much of that tinkering process which we call Legislation in this country. What the learned writer seems to desire, however, is to lead his brethren to rest less upon the ancient laws of a Coke or a Bacon, whose moral characters do not present themselves to him in an admirable light, and to induce them, as he says, to "do a little thinking" for themselves. "*E Machina Jus*" is the quaint title of a satirical article (we presume) by a writer who has filed a caveat at the Patent Office, Washington, to protect his "Tables for the construction of briefs on all questions of law, adapted to the use of either

plaintiff or defendant, and brought down to the latest published reports." The writer is sanguine enough to believe that the use of his Tables will "raise the law from a mere handicraft to the dignity and certainty of mechanical science," and that it will "reduce the formation of a brief, to a purely scientific process, free from all necessity of thought or learning in the attorney preparing it." If for the extinct "attorney" we read "Solicitor," these Tables might perchance find patrons in the Old Country. Whether grave or gay, the contents of the *Green Bag* are generally full of interest, were it only for the light which they throw on American Legal life in some of its most characteristic phases.

The Acts Relating to Income Tax. By STEPHEN DOWELL, M.A., Assistant-Solicitor of Inland Revenue. Butterworths. Second Edition. 1885.

It is difficult to know what to say about such a book as this, except that the author has necessarily a wide and varied official acquaintance with his subject, and that he has treated it with considerable elaboration and care, though his official position has apparently led to a somewhat optimistic treatment. Of Mr. Dowell's general ability, indeed, we have already spoken in this *Review*, in connection with his valuable work on *Taxation*. That shewed his grasp of the subject in general, this shews his grasp of it in particular, in regard to the details of one special and important feature of English Taxation. It is impossible for most of us to say with truth that we like the special form of Taxation which forms the matter of Mr. Dowell's present Treatise. Some few, who perhaps, as Economists so-called, think it necessary to the support of that character, have spoken in almost enthusiastic terms of the Income Tax. We cannot but think that such persons are few and far between, and we are not sure that Professor Thorold Rogers is not more to be praised for his sincerity in uttering his dislike to the Tax, as an Economist, than others of his brethren for their professed liking. Economically, it appears to be regarded in most quarters as a heresy to say a word in dispraise of a Tax which is so convenient to succeeding generations of Chancellors of the Exchequer. But there may be higher functions for John Bull to fill than making things comfortable for a Chancellor of the Exchequer. There is also the serious question whether the existence of this Tax, and the knowledge of the amount

for which it may, broadly speaking, be relied upon, does not, as has been alleged with much appearance of truth by one of the most distinguished holders of the office in recent times, itself induce successive Chancellors of the Exchequer to allow extravagance in what are called the "Spending Departments." This seems to be a question well worth the consideration of the British tax-payer.

There is another question, and that a strictly legal one, whether a body fulminating anathemas all round in the shape of heavy Fines, can be said to come into Court with clean hands when it cynically rides the Law of the Land rough-shod in the matter of married women's property. We should like to see how the Courts would treat the claim of the Commissioners that, the Married Women's Property Acts notwithstanding, they are entitled to "deem" the wife's separate estate to be the husband's, which, by the Law of the Land it is not. We believe the Commissioners have not yet gone into Court on such a case, and we can well imagine that they may not really be at all anxious to go that length. But as they year by year repeat their asserted right to tread the Law of the Land under foot, their assertion ought to be brought, sooner or later, to the test of the High Court of Justice.

A Guide to the Income Tax Acts. By ARTHUR M. ELLIS, LL.B. Solicitor. Stevens and Sons. 1886.

The general reader, who does not require so elaborate a work as that by Mr. Dowell, will find a handy manual in the little volume by Mr. Ellis, which gives in a small and convenient compass the general results of the very numerous Statutes dealing with his subject, the comment made or annotation given being both of a brief character.

Interpleader in the High Court of Justice and in the County Courts, together with Forms of the Summonses, Orders, Affi lavits, &c., used therein. By MICHAEL CABABÉ, of the Inner Temple, Barrister-at-Law. Second Edition. W. Maxwell and Son. 1888.

In this Treatise Mr. Cababé, we are glad to find, vouchsafes to give us more cases than he did in his Essay on *Estoppe*; they are all, however, in the body of the work; we think they might have been better placed at the foot of each page. The book is written more for the practitioner than the student, and we

think it will be useful to the practitioner. There are five Appendices—the first two containing Statutes and Orders regulating present and former Interpleader practice, and the other three, the Forms in Stakeholder's and Sheriff's and County Courts Interpleader.

The law as to appeals from issues is well stated on p. 84, with references to both *Robinson v. Tucker* and *Dawson v. Fox*; the case of *Hamlyn v. Bettley*, deciding that the trial of an issue is not as of course before a Judge and Jury, is noted, and the law as to feigned issues is stated with accuracy and care. The decision in *Lyon v. Morris* is quoted as the authority to support the author's view that there is no appeal from a Judge's decision in Chambers, summarily disposing of the question. This work appears to us to be in every respect superior to its predecessor from the same pen ; and the reader can easily see that his present subject is one which the author has carefully studied and on which his views may be trusted. We are glad to be able to compliment Mr. Cababé upon the possession of an easy and lucid style of writing.

Istituzioni di Diritto Civile Italiano. Per G. P. CHIRONI, Prof. Ord. di Diritto Civile nella R. Università di Torino. Turin, Rome, and Florence. Bocca. 1889. *Il Salvamento e l'Assistenza nel Diritto Marittimo.* Per GIAMBATTISTA BENFANTE. Turin, Florence, and Rome. Loescher. 1889.

We can only briefly mention these works now, in order to draw the attention of our readers to the progress of Thought in Italian Legal Circles on matters connected with Civil and Maritime Law, hoping to return to these subjects, as such, when we have more space at disposal. The works here noticed belong to entirely different *strata* of Legal Literature, the two stately volumes of Professor Chironi supplying a careful and elaborate Commentary on the existing Civil Code of the Kingdom of Italy, and the handy volume of Sig. Benfante taking the shape of a Critical Essay on Salvage and Assistance as important and closely related topics in Maritime Law.

Some idea may be formed of Professor Chironi's manner of treating his subject if we take a point which has of late years acquired a certain prominence in our Company Law, viz., Novation. This is treated in § 298, the account given by the Author being preceded, as in each substantive section, by a valuable Bibliographical Summary of Authors and Codes.

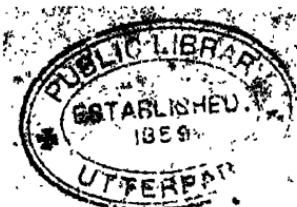
Thus, for Novation, we are referred to Windscheid, Wangerow, Brinz, Arndts-Serafini, Dernburg, *Pand.*, Förster, Siebenhaar, Stubenrauch, Salpius, Salkowski, and Römer, as well as to Aubry and Rau, Larombière and Giorgi, and to the French, Austrian, Dutch, Saxon, Portuguese and Swiss Codes in the Old World, and to those of the Argentine Republic, Chili, Guatemala, Mexico, and Uruguay in the New World. The definition is given in a simple translation of the *prioris debiti in aliam obligationem transfusio atque translatio* of Roman Law. It is then divided into (a) subjective, viz., the substitution of a new debtor for the one who is released by the creditor; (b) objective, when the debtor contracts as against the creditor a new debt, which is substituted for the old one. The value of Professor Chironi's *Istituzioni* will, we trust, from this brief sample of his method, be obvious alike to the student of Comparative Jurisprudence and to the practitioner who may have to advise on questions involving Italian Law, a matter not by any means devoid of importance in the growing commercial relations between this country and Italy.

Sig. Benfante, a disciple of Professor Sampolo, and an *alumnus* of the University of Palermo, opens his *Essay* with an Historical retrospect of the condition of Maritime Assistance in Roman and Feudal times, from the *Lex Rhodia de Factu*, and successively passes under review the Rolls and Judgments of Oléron, the *Consolato del Mar*, and the less known Maritime Statute of Ancona and *Constitutum usus* of Pisa, down to the Code of Christian V. of Denmark, 1682, the Law of 1607 of the Republic of Genoa and the French Maritime Ordinance of 1681. This is a wide field to cover, and it can only be very briefly dealt with in so small a compass as that to which the author has here restricted himself, but he gives evidence of considerable research and brings out not a few curious details from the by-ways of Mediæval History, to which we may be able to recur at a future period. The attitude of the Roman Pontiffs and of the Canonists towards the succour of shipwrecked persons is brought out with all due credit to Popes and Canonists, only, we are reminded, the heathen were beyond the care of Holy Church, and enemies of the Holy Catholic Faith might, in the words of the *Roolles d'Oléron*, be spoiled and robbed of their goods. From those far days we come down with Sig. Benfante to the Italian Mercantile Marine Code, which has recently been translated in the pages of this *Review* by our learned and able contributor, Dr. F. W. ~~Wilkes~~.

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THE
LAW MAGAZINE AND REVIEW.

No. CCLXXV.—FEBRUARY, 1890.

I.—COLONIAL FEDERATION: THE JUDICIAL COMMITTEE AND THE BRITISH NORTH AMERICA ACT, 1867.

FEDERAL union is the air in more than one geographical portion of this Empire. The greater part of one portion, British North America, has now for upwards of a score of years been federated under the name of the Dominion of Canada. Another two years from the end of June, and the four original constituent Colonies of this great Federation may celebrate, if it please them, their silver wedding. Any Federation Act must provide according to circumstances in respect of the distribution of power between the Imperial government and the Federation, and between the Federation and its constituent Colonies or Provinces. But, by the very nature of things, and having regard to the controlling force of precedent, a statute federating any group of Colonies will, it may well be taken, follow, in its main outlines, the model of the conspicuous Federation Act already on the Statute Book. Since these things are so, a brief statement of the cases which have been decided upon the Act of 1867, on appeal from Canada, in that tribunal which it is antecedently probable would be called upon to determine disputed points arising in any other Colonial federal union will not, I hope, be without interest at the present time.*

* See the Canadian Constitution treated generally and compared with that of the U.S.A., *Law Magazine and Review*, No. CCLXIII., Feb., 1887, and

The British North America Act, 1867 (30 Vict., c. 3), united into one "Dominion," under the name of "Canada," the former Provinces of Canada (which it subdivided into the two new Provinces of Ontario and Quebec, corresponding with what had been before 1840 Upper and Lower Canada), Nova Scotia, and New Brunswick. It established a Dominion Government and Parliament, and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient.† I do not purpose to paraphrase the statute. He who cares may easily read it for himself. But since the appeals, with scarcely an exception, turn more or less upon the what should be the proper construction of the 91st and 92nd sections, those two sections are printed here for greater convenience.

DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to

and No. CCLXXIII., Aug., 1889. The writer of the 1887 article regrets the want of a full and impartial discussion of the powers of the Parliament and the Provincial legislatures. There is discussion enough in the Appeal Cases to satisfy the most greedy. What is more important, there is also decision. [The treatment of the subject initiated in the Articles referred to was necessarily very brief, and we are not sure that our present valued contributor quite does justice to the purport, which was, in the main, the consideration from the point of view of Political Science, of the question how far the so-called Federal Constitutions which have been granted to some British Colonies are real Federal Constitutions at all, when compared with the Constitution of the U.S.A., or other Confederations of Sovereign States.—ED.]

† *Att.-Gen. of Ontario v. Mercer*, 8 App. Cas. 767, 774, 775.

restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any *British* or Foreign country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. *Indians*, and Lands reserved for the *Indians*.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act

assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes :—
 - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province :
 - b. Lines of Steam Ships between the Province and any British or Foreign Country :

- c. Such Works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
- 11. The Incorporation of Companies with Provincial Objects.
- 12. The Solemnization of Marriage in the Province.
- 13. Property and Civil Rights in the Province.
- 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- 15. The Imposition of Punishment, by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
- 16. Generally all Matters of a merely local or private Nature in the Province.

Questions arising upon the interpretation of this Act have been left to the decision of the ordinary Courts of Law, which, notwithstanding the great Constitutional importance of the cases, must treat the provisions of the Act by the same methods of construction and exposition which they apply to other statutes.* In words often followed and approved, the general principle of construction has thus been laid down:—

“The scheme of this legislation, as expressed in the first branch of sect. 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures. If the 91st section had stopped here, and if the classes of subjects enumerated in sect. 92 had been altogether distinct and different from those in

* *Bank of Toronto v. Lambe*, 12 App. Cas. 575; *ib.*, 581; *Att. Gen. of Ontario v. Mercer*, 8 App. Cas. 767, 775. American Constitutional cases will be found relied on at the Bar rather frequently; but the Committee have never considered any such case in giving the reasons for their opinion.

sect. 91, no conflict of legislative authority could have arisen. The Provincial Legislatures would have had exclusive power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been, and could not be, attained; and that some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, 'for greater certainty, but not so as to restrict the generality of the foregoing terms of this section' that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sect. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of sect. 92.

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those given to the Dominion Parliament. Take as one instance the subject 'marriage and divorce,' contained in the enumeration of subjects in sect. 91; it is evident that solemnization of marriage would come within the general description; yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in sect. 92, and no one can doubt, notwithstanding the general language of sect. 91, that this subject is still within the exclusive authority of the Legislatures of the Provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include 'direct taxation within the Province, in order to the raising of a Revenue for Provincial Purposes,' assigned to the Provincial Legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one.

With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that such a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

The first question to be decided is, whether the Act impeached in the appeal falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the Legislatures of the Provinces, for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature, *prima facie*, falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the Provincial Legislature is or is not thereby overborne." *

These other general principles will be found to be adhered to:—

It is not to be supposed that the Dominion Parliament

* *Queen Insurance Co. v. Parsons*, 7 App. Cas. 96, 107-109. The concluding paragraph is, of course, only directly applicable when the validity of a Provincial Act is questioned. See also *Dobie v. Temporalities Board*, 7 App. Cas. 136, 145, 149; *Russell v. The Queen*, 7 App. Cas. 829, 836; *Hodge v. The Queen*, 9 App. Cas. 117, 128, 130.

has exceeded its powers, except upon grounds really of a serious character.*

Within the limits assigned to it by the Federation Act each Provincial Legislature is supreme;† whatever power falls within the legitimate meaning of the words of the Act is what the Imperial Parliament intended to give, and such a power will not be limited by Judicial interpretation on the speculation that it may be used unwisely.‡

The Act exhausts the whole range of legislative power, and whatever is not thereby given to the Provincial Legislatures rests with the Parliament.§ *

The power of a Provincial Legislature to destroy a law of the old Province of Canada is measured by its capacity to reconstruct what it has destroyed, that is, the powers of a Provincial Legislature to repeal and alter the Statutes of the old Parliament of Canada are precisely co-extensive with the powers of direct legislation conferred on such Legislature by the Act of 1867.||

The declarations of the Dominion Parliament are not, of course, conclusive, even against that Parliament, upon the construction of the Federation Act; but when the proper construction of the language used in that Act to define the distribution of Legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.¶

It will have been observed that not only are the two

* *Valin v. Langlois*, 5 App. Cas. 115, 117.

† *Dobie v. Temporalities Board*, 7 App. Cas. 136, 146; *Hodge v. The Queen*, 9 App. Cas. 117, 132.

‡ *Bank of Toronto v. Lambe*, 12 App. Cas. 575, 586.

§ *Ib.* at p. 588; *Queen Insurance Co. v. Parsons*, *ante*.

|| *Dobie v. Temporalities Board*, 7 App. Cas. 136. See this judgment as to the case of two or more Provincial Legislatures endeavouring by similar contemporaneous legislation to effect what they could not do singly.

¶ *Citizens Insurance Co. v. Parsons*; *Queen Insurance Co. v. Parsons*, 7 App. Cas. 96, 116.

sections to a considerable degree on the face of them self-contradictory, but the enumeration of subjects in each separate section is, so to speak, very rough and ready, and rather popular and familiar than scientific. There is much reason to suppose that this arrangement is, nevertheless, industrious and artistic, and the result of a desire to leave as much liberty as possible to the Colonial Legislative bodies, both Dominion and Provincial, in their respective spheres. But in consequence of the many cross-divisions in the sections, it has always to be considered whether if a particular Act discussed does not fall within one class of rights it is yet valid as being within another, and contrariwise. In this way it has come about that I have grouped the decisions under their respective subject matters rather than under any system of rights and obligations. Some will make their appearance in more than one place.

The Administration of Justice.

The Dominion Controverted Elections Act, 1874 (Canada, 37 Vict., c. 10), provided for the trial of election petitions by the Judges of the Provincial Courts. Upon a petition filed in the matter of Valin's election it was objected that the Supreme Court of the Province of Quebec had no jurisdiction to entertain the petition. The Supreme Court of Canada, affirming the Quebec Court, overruled this objection. Upon a petition for special leave to appeal, Lord Selborne, delivering the judgment of their Lordships, said that Colonial Legislation having made a special application necessary, leave to appeal would not be granted unless their Lordships were satisfied that there was really a substantial question to be determined. Here the Board entertained no doubt that the decision of the Supreme Court was correct. The controversy was solely whether the Dominion Parliament was incompetent to pass the Act, it being alleged that the Act contravened the

14th sub-sect. of sect. 92, and that, by reason of that sub-section, although the Parliament might have created new Courts for these trials, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. But read with sect. 41, which provides for the continuance of the existing election laws, including expressly the trial of controverted elections and proceedings incident thereto, until the Dominion Parliament should otherwise provide, the sub-section relied upon could not reasonably be taken to have anything to do with election petitions. Their Lordships would advise Her Majesty that leave to appeal should not be granted.*

The Quebec Act, 43 and 44 Vict., c. 9, imposed a duty of ten cents upon every exhibit filed in any Court in any action therein. It was held, as will be seen later, that this statute could not be supported under sub-sect. 2 of sect. 92. But counsel sought also the aid of sub-sect. 14. As to this their Lordships said, by the mouth of Lord Selborne, L.C., that if a special fund had been created by a Provincial Act for the maintenance of the Administration of Justice in the Provincial Courts, raised for that purpose, appropriated to that purpose, and not available as a general revenue for general Provincial purposes, in that case they would have had to consider whether the limitation to Direct Taxation (sub-sect. 2) would still have been applicable. But the Act in question did not relate to the Administration of Justice in the Province. It did not provide in any way, directly or indirectly, for the maintenance of the Provincial Courts; it did not purport to be made under that power, or for the performance of that duty. The subject of the taxation was a matter of procedure in the Courts, but the fund to be raised was made part of the general consolidated revenue of the Province. The Act, therefore, was precisely

within the words "Taxation in order to the raising of a Revenue for Provincial Purposes," and could not be supported under the 14th sub-sect.*

Intoxicating Liquors: Regulation of Taverns.

This portion of the general subject may be illustrated by the following case, which was an Appeal from an order of the Supreme Court of the Province of New Brunswick, discharging a rule *nisi* which had been granted on the application of the Appellant for a *certiorari* to remove a conviction made by the police magistrate of the city of Fredericton against him, for unlawfully selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, 1878. The objection was that, having regard to the above printed sections of the B.N.A. Act, 1867, it was not competent for the Dominion Parliament to pass the Act in question. The Act, after reciting that it was desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors, provided for the putting of the Act in force in any country or city in the Dominion by a system of local option. When thus put into force, the Act prohibited, under penalties of fine and imprisonment, all retail traffic in intoxicating or spirituous liquors, except for certain specified purposes, *e.g.*, medicinal purposes. Applying the rule in *Parsons's Case*, already stated at length, the Board first considered whether the statute fell within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the Provincial Legislatures. It was contended that the Act fell within sub-sects. 9, 13, 16. With regard to sect. 9, the power of granting licenses is not assigned to the Provinces for the purpose of regulating trade, but for revenue purposes. This was not a fiscal Act; on the contrary, its effect might

* *Att.-Gen. of Quebec v. Reed*, 10 App. Cas. 141, 144, 145.

be to diminish revenue. Nor did the Act belong to the class of subjects "Property and Civil Rights."* Most criminal offences had some relation to property rights. The primary matter here dealt with was one relating to public order and safety. In however large a sense the words "Property and Civil Rights" were used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Applying again the rule in *Parsons's Case*, the two sections must be read together; laws designed for the promotion of public order, safety, or morals, were of a nature which fall within the general authority of the Parliament to make laws for the order and good government of Canada, and have direct relation to the Criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subjects to which it really belongs. Finally as regards sub-sect. 16 of sect. 92, the contention was that, at least in the absence of a general law of the Parliament of Canada, the Provinces might have passed a local law of a like kind, each for its own Province, and that by means of the "local option" provision, the Act was, in effect, of a merely local character. In the view taken by their Lordships, the legislation was general, and the provision for the special application of it to particular places did not alter its character.†

[* It might surely, however, be argued that the right to procure what are somewhat invidiously called "Intoxicating Liquors," viz., beer, wine, spirits, is a Civil right, as part of the general right to obtain food for the sustenance of the individual by lawful means, i.e., by paying for it.—ED.]

† *Russell v. The Queen*, 7 App. Cas. 829. Cf. *Citizens Insurance Co. v. Parsons*, *post*.

So, in the converse case, it was held that the Liquor License Act of 1877, c. 181, Revised Statutes of Ontario, making regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, as the times of opening and closing, did not interfere with "the general regulation of trade or commerce" (91 (2)), but came within Nos. 8, 15, and 16 of sect. 92, and was within the powers of the Provincial Legislature.*

Lands: Royalties.

The question to be determined was whether lands in the Province of Ontario, escheated to the Crown for defect of heirs, "belonged" (in the sense of the Act) to the Province of Ontario or to the Dominion. The lands were held in free and common socage. When the Act of 1867 passed, the revenue arising from all escheats to the Crown, within the Province of Canada, was, by reason of former legislation, subject to the disposal and appropriation of the old Canadian Legislature. By sect. 102 of the Act—

"All Duties and Revenues over which the respective Legislatures of *Canada*, *Nova Scotia*, and *New Brunswick*, before and at the Union, had and have Power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred upon them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the manner and subject to the Charges in this Act provided."

There is only one clause in the Act, their Lordships continue, by which any sources of revenue appear to be distinctly reserved to the Provinces, viz., sect. 109.

"All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of *Canada*, *Nova Scotia*, and *New Brunswick*

* *Hodge v. The Queen*, 9 App. Cas. 117. Held also that "imprisonment" in No. 15 of sect. 92, means imprisonment with or without hard labour.

at the Union, and all sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of *Ontario, Quebec, Nova Scotia, and New Brunswick*, in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the province in the same."

It was insisted at the bar for the Dominion, that these words were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands, and did not belong to the Crown. But the real question was as to the effect of "Lands, Mines, Minerals, and Royalties," taken together. Their Lordships thought "Royalties" should have its primary sense, "*regalitates*," "*jura regalia*," there being nothing in the context to indicate the contrary; and they arrived at the conclusion that the escheat in question belonged to the Province.*

So the legal effect of sect. 105 being to exclude from the "Duties and Revenues" appropriated to the Dominion, all the ordinary Territorial revenues of the Crown arising within the Provinces, the fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion (sect. 92 (24)) is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disengaged of the Indian title.†

And again, it was held that a conveyance by the Province of British Columbia to the Dominion, confirmed by the

* *Att.-Gen. of Ontario v. Mercer*, 8 App. Cas. 767. The judgment contains an interesting exposition by Lord Selborne, L.C., of the "*dominium directum*" of the Crown.

† *St. Catherine's Co. v. The Queen*, 14 App. Cas. 46. As to the questions regarding the position of the Indians touched on in this judgment, cf. Boyd's *Wheaton's International Law*, §§ 38, 38a. "Belong" equals beneficial interest. The legal ownership is in the Crown. See *Att.-Gen. of Ontario v. Mercer*; *St. Catherine's Co. v. The Queen*, *ubi supra*, and the next case cited.

necessary legislation, of "public lands," being in substance an assignment of the Provincial right to appropriate the Territorial revenues arising from such lands, did not imply any transfer of its interest in revenues arising from the Prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the law, but *jura regalia* belonging to the Crown, and, under sect. 109, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.*

Taxation.

To ascertain whether or no a tax is lawfully imposed, it will be necessary to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of sect. 92 of the Federation Act, viz., "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes?" Secondly, if it does, are we compelled by anything in sect. 91 or in the other parts of the Act so to cut down the full meaning of the words of sect. 92 that they shall not cover the tax in question? †

Thus, the first question will always be, is the tax a Direct Tax? For this purpose it is quite proper to have regard to the opinions of writers on Political Economy. But yet the question, the meaning of the words in the Statute, is a legal one. Economists are apt to use the words "direct" or "indirect" according as they find that the burden of a tax abides more or less with the person who first pays it. The Legislature, on the other hand, cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have con-

* *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*, 14 App. Cas. 295. British Columbia was admitted into the Dominion by O.C., 16th May, 1871: see sect. 146.

† *Bank of Toronto v. Lambe*, 12 App. Cas. 575, 581.

templated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.*

So a License Act by which a licensee is compelled neither to take out nor to pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, being virtually a Stamp Act and not a License Act, the imposition by such Act of a stamp duty on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp be not affixed, is not warranted by either sub-sect. 2 or sub-sect. 9 of sect. 92. Political Economists are all agreed that the imposition of such a stamp is not Direct Taxation. Judicial interpretation, also, has always treated stamps either as Indirect Taxation, or as not being Direct Taxation. The popular use of the word is entirely the same.†

And the Quebec Act (43 & 44 Vict., c. 9), which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein, was, upon like reasoning, held to be *ultra vires* of the Provincial Legislature.‡

Again, a tax imposed by a Provincial Legislature upon banks which carry on business within the Province, varying in amount with the paid up capital of the bank, and with the number of its offices, whether or not the principal place of business of the particular bank is within the Province, is Direct Taxation within sub-sect. 2 of sect. 92, the meaning of which is not restricted in this respect by either sub-sect. 2, 3, or 15 of sect. 91.

* *Ib.* 582; *Att.-Gen. for Quebec v. Queen Insurance Co.*, 3 App. Cas. 1,000, 1,100; *Att.-Gen. for Quebec v. Reed*, 10 App. Cas. 141, 143.

† *Att.-Gen. for Quebec v. Queen Insurance Co.*, 3 App. Cas. 1,000.

‡ *Att.-Gen. for Quebec v. Reed*, 10 App. Cas. 141.

Similarly, with regard to Insurance Companies taxed in a sum specified by the Provincial Act.*

Sub-sect. 2 of sect. 92 does not only authorise taxation for the purpose of raising a Revenue for General Provincial purposes, that is, taxation incident on the whole Province for the general purposes of the whole Province, but enables the Provincial Legislature whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the Province, as upon a particular parish for the purpose of subsidizing a local undertaking.†

Bankruptcy and Insolvency.

The Canada Statute 40 Vict., c. 41, amending the Canadian Insolvent Act, and providing that the judgment of the Court of Appeal should be final, was held to be within the competence of the Dominion Parliament and not to infringe the exclusive powers given to the Provincial Legislatures. For procedure must necessarily form an essential part of any law dealing with insolvency. It was, therefore, to be presumed, and was indeed a necessary application, that the Imperial statute, in assigning to the Dominion Parliament the subjects of Bankruptcy and Insolvency (91. (21)) intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect property, civil rights, and procedure (92 (13) (14)).‡

Conversely, the Quebec Act to relieve *L'Union St. Jacques de Montréal* (33 Vict., c. 58), relating to a benevolent or benefit society incorporated in the city of Montreal,

* *Bank of Toronto v. Lambe*; *Bank of Canada v. Lambe*; *Bank of Commerce v. Lambe*; *North British Mercantile Insurance Co. v. Lambe*, 12 App. Cas. 575.

† *Dow v. Black*, L.R. 6 P.C. 272, 282.

‡ *Cushing v. Dupuy*, 5 App. Cas. 409.

taking notice of a certain state of embarrassment resulting from the improvident regulations of the society, and commuting the existing rights of two widows accordingly, is clearly a private and local matter within sect. 92 and is not affected by sub-sect. 21 of sect. 91.* If there had been a general Dominion statute within which the case of the society fell, then their Lordships doubted, but expressed no opinion, as to the competency of the Provincial Legislature to deal with the matter.†

Corporations.

In respect of corporations the conflict is in the main between No. 2 of sect. 91, "Regulation of Trade and Commerce" and No. 13 of sect. 92, "Property and Civil Rights in the Province." The general result of the cases, which are stated below, may be said to be that the Dominion Parliament has power to make political arrangements in regard to trade requiring the sanction of Parliament, to regulate trade in matters of inter-provincial concern, and to make general regulations in regard to trade affecting the whole Dominion, and so to create a Corporation with power to carry on certain definite kind of business within the Dominion. A Provincial Legislature cannot destroy a Corporation so created by the Parliament, or one existing under the statutory authority of the old Parliament of Canada, but it can impose conditions upon the transaction of business by the Corporation within the Province.

Churches.

The Ministers of the Presbyterian Church of Canada in connection with the Church of Scotland, were entitled, by virtue of several Imperial statutes,‡ to an endowment or

* *L'Union St. Jacques de Montréal v. Bélisle*, L.R. 6. P.C. 31.

† *Ib.* at pp. 36, 37.

‡ 14 Geo. III., c. 83; 31 Geo. III., c. 31; 7 and 8 Geo. IV., c. 62; 3 and 4 Vict., c. 78; 16 Vict., c. 21.

annual subsidy out of the revenues derived from Colonial lands, termed, clergy reserves, and from moneys obtained by the sale of portions of these lands, supplemented when necessary, from the Imperial Exchequer. This connection between Church and State was dissolved in 1853-5,* and in the course of legislation from 1855 to 1858 by the old Parliament of Canada,† a Board, the Temporalities Board, was constituted a Corporation to administer the Fund derived from the life interest in the reserves which had been reserved to the ministers by the Imperial statute of 1853.‡ In 1874 it was proposed to incorporate the Presbyterian Church of Canada in connection with the Church of Scotland, the Canada Presbyterian Church, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces. In June, 1875, a Synod of the Presbyterian Church of Canada in connection with the Church of Scotland resolved, the appellant and nine others dissenting, that this proposed union be effected, and various resolutions were adopted with that view. To facilitate this contemplated union, the Quebec Act, 38 Vict., c. 62, 1875, was passed to remove difficulties as to the Temporalities, and vacancies on the Temporalities Board were to be filled up in the manner provided by the Quebec Act, 38 Vict., c. 64. This last-mentioned statute expressly amended the Canada Statute, 22 Vict., c. 66. The general result was to pretend to create a new body, "The General Assembly of the Presbyterian Church in Canada." The appellants, who maintained that they alone remained the Presbyterian Church of Canada, then instituted this suit to secure the benefits and control of the Temporalities Fund. The question was as to the validity of the Quebec Act, 38 Vict., c. 64. The power to repeal an old statute was co-extensive

* 16 Vict., c. 21 (Imperial); 18 Vict., c. 82 (Canada).

† 18 Vict., c. 82; 22 Vict., c. 66.

‡ 16 Vict., c. 21.

with the power to enact a new one. It was contended that the Act was valid within Nos. 7, 11, and 13 of sect. 92. The substance of the judgment of their Lordships was that the law was not a law to regulate rights in the Province or with Provincial objects. The rights and status of the Temporalities Board and the Church for the benefit of the ministers and members of which the Funds were to be administered existed not only within, but also without the Province. The appellants accordingly succeeded.*

Building Association.

The Colonial Building and Investment Association was incorporated by the Canada Statute, 37 Vict., c. 103. The Association was empowered in the ordinary way to carry on speculations in land and houses throughout the Dominion. For financial reasons it had confined its operations to the Province of Quebec. It was held that the Incorporating Act was *intra vires* the Parliament, and that the fact that the Association had thought fit to confine the exercise of its powers to one Province could not affect its status as a Corporation originally validly created.†

Insurance Companies.

The question was whether the Ontario Act, 39 Vict., c. 24, enacting certain statutory conditions, applied to policies of insurance effected within the Province with an Insurance Company incorporated by statute of the old Parliament of Canada and with an Insurance Company incorporated by Imperial statute respectively. It was contended that the Ontario Act did not come within No. 13 of sect. 92, because

* *Dobie v. Temporalities Board*, 7 App. Cas. 136.

† *Colonial Building and Investment Assoc. v. Att.-Gen. of Quebec*, 9 App. Cas. 157. It was also asked that the Association might be restrained from infringing within the Province certain Provincial laws. This broke down on the form of the petition. As to the merits, consider the next case stated below, at p. 117 of the Report.

"Property and Civil Rights" did not include rights arising out of contract. The Board rejected this contention. It was further contended that the Act was invalid by reason of No. 2 of sect. 91. Whether the business of insurance was Trade and Commerce or not, in the opinion of their Lordships the authority to legislate for the regulation of Trade and Commerce did not comprehend the power to regulate by legislation the contracts of a particular business or trade in a single Province, and therefore this legislative authority did not, to this extent, limit No. 13 of sect. 92. Further, the Act did not interfere with the status of the Canadian Company as a corporation, but merely regulated its action within the Province; in the judgment of their Lordships it was competent to the Provincial Legislature to do this, and the Act was valid.*

Railways.

The 108th sect. of the Federation Act, which must be read in connection with the third schedule of the Act, had the effect of transferring, upon the 1st of July, 1867, to the Dominion all railways which were the property of the Provinces, but had not the effect of vesting in Canada any other or larger interest in these railways than that which belonged to the Province at the time of the statutory transfer.†

The combined effect of a deed and a Quebec Statute, if the transaction was valid, was to transfer a Federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company to the Quebec Government, and, through it, to a Company with a new title and a different organization; to dissolve

* *Citizens Insurance Co. of Canada v. Parsons; Queen Insurance Co. v. Parsons*, 7 App. Cas. 96.

† *Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co.*, 7 App. Cas. 178. And see the 108th sect. printed above.

the old Federal Company, and to substitute for it one which was to be governed by, and subject to, Provincial legislation. Their Lordships were^{*} of opinion that such a transfer, except under the authority of an Act of Parliament, would be held to be *ultra vires* of a railway company by the law of England;† that it was equally repugnant to the law of Quebec;‡ and, above and beyond this, that the special legislation affecting the Company—in its inception a Provincial railway, subsequently declared by Canada Statute 36 Vict., c. 82, to be a Federal enterprise—taken in connection with, and read by the light of sect. 91, and sub.-sect. 10, of sect. 92, established that the transaction between the Railway and the Government of Quebec could not be validated by an Act of the Provincial Legislature, but that an Act of the Dominion Parliament was necessary to give it force and effect.‡

The New Brunswick Statute 33 Vict., c. 47, empowered the majority of the inhabitants of St. Stephen, in the county of Charlotte, to raise by local taxation a subsidy, designed to promote the construction of a Railway extending beyond the limits of the Province, but duly authorised by the Legislature of New Brunswick prior to 1867; it was held that the Act could not be said to be a law in relation to a Railway work or undertaking within the fair meaning of No. 10 (a) of sect. 92, but related to "a matter of a merely local or private nature in the Province" within the meaning of No. 16 of that section.§

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* *Gardner v. L. C. & D. Ry. Co.* L.R. 2 Ch. 201, 212.

† *Civil Code*, Art. 369.

‡ *Bourgoign v. La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental*, 5 App. Cas., 381.

§ *Dow v. Black*, L.R. 6 P.C. 272.

II.—THE LAW OF NEGLIGENCE.*

IN our short notice of Mr. Beven's book on the subject of the present Article, we took occasion to observe that the author aims not merely at collecting authorities, but at discussing them. Returning, as we then expressed the hope of doing, to a closer analysis of the book than we had space for at that time, we think we cannot better illustrate Mr. Beven's method than by following him through one or two of the arguments which he has raised on points as to which he differs more or less from Courts or from individual Judges.

In the well-known case of *Heaven v. Pender*,† the following words were spoken by the present Lord Esher (then Sir W. Baliol Brett), M.R.:—“ Whenever one person is by “ circumstances placed in such a position with regard to “ another that every one of ordinary sense who did think “ would at once recognise that if he did not use ordinary “ care and skill in his own conduct with regard to those “ circumstances he would cause danger of injury to the “ person or property of the other, a duty arises to use “ ordinary care and skill to avoid such danger.” It may at once be mentioned that this proposition was not necessary for the decision which was arrived at, and that it was rejected by Cotton and Bowen, LL. JJ., although they concurred with the M.R. in the opinion that there was negligence in the particular case. They considered the circumstance of the second “ person ” being engaged on work in which the first “ person ” was interested to be an important element; denying, in effect, that the

* *The Law of Negligence*. By THOMAS BEVEN, Esq., Barrister-at-Law. Stevens and Haynes. 1889. See *Law Magazine and Review*, No. CCLXXIV., Nov., 1889.

† L.R. 11 Q.B.D. 503.

proposition of the M.R. is true of A. and B. generally, but accepting it if supplemented by a species of relation (perhaps not as yet completely defined) between A. and B. Mr. Beven stoutly maintains the same view. As the proposition, under the circumstances, can scarcely rank higher than an *obiter dictum*, it might have been left unnoticed, had it not acquired a factitious celebrity which may possibly, in time, convert it into a recognised definition. In *Hurst v. Taylor** it was quoted at full length by a member of the Junior Bar; but the Court passed it over in discreet silence. In a later case, however, *Thruskill v. Handyside*,† it received an unmistakeable hoist upwards from Hawkins, J., who also quoted it at length, and followed it up with the words, "That, in my opinion, is a correct statement of the law." Again the maxim was used without being necessary to the decision, for the very relation existed between A. and B. which Cotton and Bowen, LL.JJ., had considered to be necessary. It is somewhat singular that, in adopting the words under consideration, Sir Henry Hawkins should have made no allusion to the fact that a majority of the Court condemned them when they were first uttered. It is singular also that, in his own language preceding the quotation, he appears to rely and insist on the very relation of which the unlucky *dictum* boldly denies the necessity. If the injured person had been a tramp seeking shelter from the night wind, or a lover of Architecture visiting the premises out of mere curiosity, he would have been clearly within Lord Esher's *dictum*, but his case would not have come in any sense whatever within Sir Henry Hawkins's words thereon: "Where a man is employed to do certain work, and knows that the work which he is doing is dangerous to others, and that accidents are likely to happen, and knows that

* L.R. 14 Q.B.D. 518.

† L.R. 20 Q.B.D. (wrongly printed "20 Q.B.," in Mr. Beven's book, p. 61), 359.

"persons are lawfully engaged in other work, and are under an obligation to perform such work." It is a sad bathos, after such words, to come down to the vague "Whenever one person," &c., and it seems clear that, if those words constitute a "correct statement of the law," the reasoning which precedes them is entirely unnecessary.

Mr. Beven tells us—correctly, we believe—that the English Courts have not adopted Lord Esher's proposition, but that it has been approved in the American decision, *Wabash, &c., Railroad Company v. Locke*,* and loudly extolled by one or two writers of text-books. If, therefore, there is reasonable doubt as to the propriety of this *dictum*, it is high time that such doubt should be formally put in issue, lest it should obtain, for lack of opposition, a really authoritative sanction in our country.

Mr. Beven has dealt with the question at some length, and his labour, it may be hoped, will not be thrown away. The hypothetical cases with which he illustrates his *negation* of the proposition will be read with interest (see pp. 63-64, note), more especially as they throw a refreshing light on his own views, which are, perhaps, just at this point a little less clearly expressed in the text than might be wished.

With reference to *Talley v. Great Western Railway Company*,† and *G.W.R. Company v. Bunch*,‡ Mr. Beven writes thus in his Preface: "It will be curious to note "whether the law of England will be turned into a new "channel by the error of a reporter." We can tell him of the actual occurrence of such a mischance in India, where an imaginative "head-note," printed in 1820, introduced false law into a popular text-book, which led to a wrong decision as late as 1866.§ It would, perhaps, be rash to

* 2 A.M. St. Rep. 193. † I.B. 6 C.P. 44. ‡ L.R. 13 App. Cas. 31.

§ The history of this ludicrous blunder was not traced out until 1877, when a detailed account of it was given in the present writer's *Chart of Hindu Family Inheritance*. W. B. Allen. Second Ed., 1877, p. 16, note.

aver that a fatality which has actually fallen upon English Judges in India cannot possibly happen to their more majestic, but still human, brethren at home. But let us examine the cases alluded to by Mr. Beven. Both were cases of passengers' luggage, placed, by request of the passengers themselves, in the same carriage with them, instead of being put in the usual luggage-van so as to be under the entire control of the Company's servants. In the earlier case Willes, J., held that under such circumstances the Company's general liability (as common carriers) is modified by the implied condition that the passenger should use reasonable care, and that, if the loss of the luggage is caused by his neglect to do so, and would not have happened without such negligence, the Company is not liable. In the later case, the Lord Chancellor (Lord Halsbury) relied on the earlier decision just mentioned, and on several other cases, as supporting him in the proposition that "a railway Company in accepting a passenger's " luggage for carriage in a passenger train, and in the " carriage with the passenger himself, do enter into a " contract as common carriers, modified only to the extent " that if loss happens by reason of want of care of the " passenger himself who has taken within his own immediate " control the goods which are lost, their contract as insurers " does not apply to loss occasioned by the passenger's own " default."* Mr. Beven finds fault with the word "only" in this passage, as importing, on the alleged authority of Mr. Justice Willes, the doctrine that the Company is liable still in *any* case except that of negligence on the part of the passenger, whereas, in another part of his Judgment, that learned Judge had in fact said that the Company

* Mr. Beven (*op. cit.*, p. 686) quotes this passage *verbatim* down to "of the passenger," and summarises the rest in the words "the Company is to be liable." We assume that the word *not* has been accidentally omitted after "is."

would only be liable in the case of negligence on its own part. There might be circumstances, Mr. Beven implies, under which the loss would occur without negligence on either side, and in that case the Lord Chancellor alleges, on the authority of (among others) of Mr. Justice Willes, that the Company's liability as carriers remains, while Mr. Justice Willes himself asserted that it did not.

The question is rather a delicate one, and we hesitate to express a decided opinion about it. That such cases, *i.e.*, cases in which there is no negligence on either part, do occur, is clear, as we shall see immediately. The "reporter" grievance seems to be this, that the absence of negligence on the part of the Company is not mentioned with sufficient prominence in the head-note of *Talley v. Great Western Railway Company*, and that, consequently, the Lord Chancellor may perhaps have overlooked that feature of the case. Mr. Beven tells us that the head-note in the *Law Journal Reports* is differently worded, describing the case as almost identical with *Bergheim v. Great Eastern Railway Company*, a case in which there was no negligence on either side and in which we find that the head-note in the *Law Reports* distinctly states the absence of negligence on the part of the Company, but says nothing about that of the passenger. It is unfortunate that Reporters should not be more careful in this branch of their work: the head-note in the last-mentioned case is, of course, just as defective as that of *Talley v. Great Western Railway Company*, but it has not yet misled any Court, as far as we know. It seems to us that the correctness of head-notes is a matter of much practical importance, and that their revision might reasonably form the work of a responsible official. At present, they cannot be trusted continuously without risk, though it may be admitted that they are often

framed with care and judgment. We take leave of what may be called the "take yer 'at-box, with you, Sir?" question with the uncomfortable feeling that if a *dictum* of one very high authority is law, a deliberate decision of another very high authority is not.

We have only been able to touch lightly one or two comparatively small portions of the ground which has been so deeply dug and delved into by Mr. Beven, and it must be understood that we have only referred to a few out of the many important or interesting questions which he has raised. On these particular points we have endeavoured to reproduce his views, and we think we have done so correctly though briefly; but we by no means wish to make Mr. Beven responsible for any of our statements. His method of closely analysing the cases is likely to be of service to the study and progress of Law; it forms a striking contrast to the perfunctory practice of some writers, who are content to enumerate decisions for and against any doctrine in an unintelligent manner, finishing up with a milk-and-water statement as to "the balance of authority" or "the better opinion." All experienced lawyers, whether practitioners or writers, or both, are well aware that many a noxious parasite has sprung up and twined itself round the great tree of the Law, unnoticed by the Courts until some Judge has declared that he cannot think how it came to grow, but that it is now too fully grown up to be stopped. Hence we have seen the anomalies of Curtesy but no Dower of Equitable Estate, applicability of the Statute of Uses to a "lease for a year" though not to Leasehold generally, and wills rendered useless by subsequent gifts, though the Law says that they can only be altered by other means. Mr. Beven is doing good service in labouring to prevent such things from happening in future, as far he can. We observe that he has his own views as to what should be the sources

of our Law. On these matters we offer no opinion, but we remark, not without interest, that, in reply to anticipated objections on the part of those who would blame him for giving too much Roman Law, he is ready to answer in effect, "I would give you plenty more if I could." Continental Jurists may see in this attitude of the learned author of the *Law of Negligence* another proof of the ardour with which the younger generation of the Legal Profession in England is throwing itself into the study of the Civil Law. And our kin beyond the sea may note with interest that Mr. Beven prefers the decisions of the Supreme Court of the United States to those of "that fluid tribunal, a Divisional Court." We do not say that he is wrong; but why "fluid"? Perhaps Mr. Beven means that its judgments lack solidity!

ALMARIC RUMSEY.

III.—THE ANGLO-PORTUGUESE DIFFICULTY IN SOUTH EASTERN AFRICA.

Introduction.

BY the publication of the official correspondence between the Governments of Great Britain and Portugal, in regard to the differences which have arisen concerning Mashonaland and the Nyassa and Shiré districts, we are in a position to form a just and impartial opinion thereon, upon the basis of the Law of Nations. I therefore propose to lay before the readers of the *Law Magazine and Review* a true and full statement of facts, derived from the correspondence published in the *London Gazette* of 17th January, 1890, and from such other authentic and reliable sources, as shall appear to be unquestionable, and then to state the principles of Law

applicable to the dispute, and the conclusions which may fairly be drawn from the whole facts, circumstances, and principles involved therein.

Geographical and Historical Facts as to Africa.

As the dissension between the British and Portuguese Governments involves the commerce and civilisation of a large portion of Africa, I shall here refer to some facts of a geographical and historical nature. The total area of Africa is 12,000,000 square miles. The Straits of Gibraltar, which separate Europe from Africa, are only ten miles wide at their narrowest part; and the Strait of Bab-el-Mandeb, between Africa and Asia, is only about seventeen miles wide. The principal States of Africa lie round the margin of the Continent, but the tribes of the interior are being gradually brought under the influence of Civilisation. The chief rivers are the Nile, the Niger, the Congo, the Orange River, the Limpopo and the Zambesi. The Nile has its source in a large lake, the Victoria Nyanza, the southern extremity of which is nearly 3° south of the Equator. Its total length must be 3,000 miles. The Zambesi is formed by two streams, the Lecambze and Leeba. The former rises in the neighbourhood of Lake Bangweolo, and the latter in Lake Dilolo. The united stream then flows southward, through the Barotse Valley; and below Sesheke is joined on the left bank by the Chobé. A little below the junction are the celebrated Victoria Falls, caused by an immense crack in the rock which forms the bed of the river. The narrow channel into which the river falls is continued away to the left, and the Zambesi flows north-east until it is joined by the Cafué on the left bank. It then turns eastward, and crosses the East Coast Range. Below Sena, the main stream is joined by the Shiré which drains Lake Nyassa, a Lake which rivals Tanganyika in size. The Zambesi empties itself by a delta after a course of 2,000 miles. The Lakes Tanganyika and Nyassa

and the River Zambesi have become famous by the travels and discoveries of Livingstone and Stanley, and other great and celebrated travellers, English, Scotch, American and Continental. The total population of Africa is roughly estimated at 200,000,000, of whom the greater proportion belong to the Negro type. Northern Africa is chiefly inhabited by three races, the Berbers, Moors and Arabs. The Berbers are supposed to be descendants of the original tribes who inhabited the States of Barbary. The Moors are a mixed race, descended partly from the original inhabitants and partly from successive waves of colonists and conquerors. The Arabs have spread over a large portion of Northern Africa, and Arabic is understood, more or less, all over the continent to the north of the Equator. Round the margin of the continent, the native tribes have, through intercourse with the European and Asiatic races, become very much mixed. Thus the Arabs have spread over the north and east of the continent; the Portuguese on both the east and west coasts; the English and Dutch in South Africa, and the French in Algeria. The greater portion of the inhabitants of Africa may be taken as professing a more or less Fetishistic type of religion, but Mohammedanism is dominant in the North of Africa. The inhabitants of Abyssinia profess a form of Christianity derived from the Coptic, but with an apparent admixture of Jewish elements. The Christian religion has also been introduced into the English, French and Portuguese settlements, as well as among some of the tribes of the interior. The chief European settlements in Africa are on the western and eastern coasts, and in the centre. Under the term Western Africa is included Senegambia and Upper and Lower Guinea. In this part the chief European possessions are held by Great Britain, France and Portugal. Under the term Central Africa is included the vast area which extends from the Soudan

to the Kalahari Desert, and which is bounded on the east and west by the coast ranges. It, embraces the region of the Equatorial lakes and the basins of the Congo and the Zambesi. That part of the interior which is drained by the Congo and Lualaba seems to be of an extremely fertile character. The three most powerful chiefs of this part of Africa at the present time appear to be Kasonga, King of Urwa, whose capital, Kilemba, stands to the north-west of Lake Kassali; Muata Yano, King of Ulanda, a country further south, the capital of which, Kabebé, stands in the basin of the Kassali; and Cazembé, whose territory lies in the valley of the Luapula. Between the Lualaba and Lake Tanganyika is the country of the Manyuema, covered with vast forests and swamps. The inhabitants are described by Dr. Livingstone as being a fine race of men, with copper coloured complexions and well formed heads. The natives are skilled workers in iron and copper. Markets are held at stated times, and the women attend them dressed in their best. One of the most important of those markets is that of Nyangwe, which stands on the Lualaba. Here the trade routes from the east and west coasts of Africa meet, and Arab merchants from Zanzibar carry on trade with half-caste Portuguese from Cassangi and Bihé. Lake Tanganyika is about 300 miles in length, and its shores are densely populated by Negro tribes. Ujiji, a country on its north-eastern shore, has been made familiar to us through the visits of various English travellers: the capital is Kawélé. The country to the east of Lake Tanganyika is nominally subject to Zanzibar and Germany,* but is occupied by a number of native tribes who are practically independent. The chief town in these parts is Kaseh, the great emporium of trade in Eastern Africa. Lake Victoria Nyanza is the largest of the African lakes, and has an area of about

* *Vide* Stanley's new map.

28,000 square miles. Its eastern shore seems to be inhabited by fierce and warlike tribes. On its western shore are the Kingdoms of Karagwé, Uganda and Unyoro. The most powerful of these is Uganda, whose King, M'tésé, appears to be friendly disposed towards Europeans. The basin of the Zambesi is inhabited by the Makololo and other tribes, who are chiefly engaged in agricultural or pastoral pursuits. Between the Zambesi and the western shores of Lake Nyassa the country is but thinly populated, owing to the depredations of the Portuguese slave-traders. With a view to putting a stop to this traffic, and to introducing civilisation among the tribes of the interior, a settlement called Livingstone has been formed on the south-western shore of the Nyassa by emigrants from Scotland, and steamers now navigate the lake. The country between the Zambesi and the Orange River is inhabited by two races; on the east there are the Matabele, Bechuanas, and other Kaffir tribes; on the west the Hottentots. To the south stretches the Kalahari Desert. Westward of the desert are Damara and Namaqualand; to the east are the Orange Free State, the Transvaal and Zululand. Eastern Africa stretches from Delagoa Bay to Cape Delgado, and is under the influence of the Portuguese; the chief towns are Sofala, Quilimane, and Mozambique. Sofala is supposed by some to represent the Ophir whence gold was brought by the ships of Solomon. Quilimane, on the delta of the Zambesi, is a mere village, and stands in an unhealthy situation. Mozambique, the capital of the Portuguese possessions on this coast, stands on a small coral island close to the shore. It was once a place of great trade; but its influence has greatly declined. Its chief exports are ivory, and gold-dust. The dominions of the Sultan of Zanzibar extend from Cape Delgado to the small island of Warsheikh. All the islands along this coast, a few small ones excepted, belong to him; but on the mainland his dominion scarcely

extends beyond the walls of the towns garrisoned by his Arab troops. A great trade is carried on by his subjects with India, and is chiefly in the hands of the Banians, who are Hindoos. The chief towns are Zanzibar, Bagamoyo and Mombasa. Zanzibar stands upon an island of the same name, which is about twenty-five miles from the mainland. The chief inhabitants are Arab landed proprietors, who have large estates and numerous slaves. The Banian merchants number about 6,000. The town of Zanzibar has a population of 80,000. Bagamoyo, or the opposite mainland, is the starting-point for the caravans which proceed to Kaseh and other places in the interior. Mombasa, on an island to the north of Zanzibar, is a place of considerable importance. On the high land to the north is the Mission Station of Ribé. My statement as to the British possessions in Africa will be very brief. These possessions include those on the west coast, those in Southern Africa, and the Islands of Ascension, St. Helena, and Mauritius. In our West African settlements are included Gambia, Sierra Leone, the Gold Coast, and Lagos. Our possessions in South Africa extend on the west as far as Cape Frio; on the east to the River Limpopo. In this district, besides the Colonies of the Cape and Natal, there are Basutoland, Griqualand West, Namaqualand, Damaraland, and Ovamoland, between the Orange River and Cape Frio. The Transvaal, between the Vaal and Limpopo, the Orange Free State, Zululand, and Kaffraria are still nominally independent, but it has been proposed to unite them together with the British Colonies in a South African Confederation. In view of a possible future Confederation of the States of South Africa under the protection of Great Britain, our Government laid claim to Delagoa Bay, which is to the north of the Colony of Natal, and is the natural outlet for the Transvaal territory. This claim was resisted

by Portugal, and the dispute was referred to Marshal MacMahon, then President of the French Republic. After careful consideration, he decided in favour of the Portuguese. In March, 1881, however, the Portuguese Chamber of Deputies agreed to cede Lourenço Marques to the British Crown. This gives an access by Delagoa Bay to the British South African Colonies. Port Natal was discovered by Vasco da Gama on Christmas Day, 1497. In 1650, the Dutch effected a settlement in the neighbourhood of the Cape, and gradually spread over the adjacent country as far as the Nieuwveldt. Towards the close of the last century, the Dutch Colony was seized by England, and the British title was recognised in 1815. After the passing of the Emancipation Act in 1834, many of the Dutch settlers who had Hottentot slaves, dissatisfied with the compensation offered to them by the British Government, migrated with their families across the Drakenbergen into the district now known as Natal. There they set up an independent Government, which Great Britain refused to acknowledge, and Natal was made a British Colony in 1845. A second migration, or trekking, now took place, and the Orange Free State and the Transvaal Republic were established. The Transvaal was annexed to the Cape in 1877, but regained its independence in 1881, under the suzerainty of the British Crown. The foregoing geographical and historical statement, based principally on Lawson's *Manual of Modern Geography* (Lond., n.d., but *circa* 1887) will, it is hoped, be found to assist the reader in the appreciation of the documents, facts, and arguments which I have now to state in regard to the Anglo-Portuguese differences in South Eastern Africa. Upon this statement I base the following conclusions: 1st. That in Eastern, Western, and Central Africa, the British and Portuguese possessions and interests are, as yet, the greatest European interests in Africa; 2nd. That the civilisation of Africa

has scarcely begun; 3rd. That slavery, under any form, should be extirpated from every part of the British and Portuguese possessions in Africa; and 4thly. That, where doubtful, the territories and spheres of influence of Great Britain and Portugal in Africa 'should be clearly and explicitly defined by an amicable arrangement between our own country and Portugal. I shall now, first of all, state the Portuguese contentions as to Mashonaland, and the Nyassa and Shiré districts, and South Eastern Africa generally.

I. The Portuguese Case.

By a Royal Decree, dated 7th November, 1889, and on the narrative that it was a matter of the greatest importance to the Portuguese nation to consolidate the dominion and sovereignty which it held in the interior of the African continent; and to establish certain strongholds and centres of official action in order to afford to lawful trade such protection as it might require for its development, and to oppose certain Slave Trade and slavery practices that were prevalent among the pagan and barbarous tribes of the wilds in the interior; and that the ancient village of Zumbo, on the left bank of the Zambesi, presented itself as an appropriate place for the seat of a new district in the Province of Mozambique, in view, not only of the mildness of its climate and the fertility and richness of the territories which surround it, but also of the extensive network of navigable rivers of which it is the centre, such as the Upper Zambesi, and its great affluents, the Cafucué and North Aruangua; the King of Portugal decreed: -

"Article I. A new district is established in the province of Mozambique under the name of Zumbo, its capital being the village of the same name.

"Article II. The new district of Zumbo—which is, in virtue of this decree, separated from Tete—is bounded by the course of the Rivers Bissambo and North Aruangua

from the point of confluence of the first named river as far as the nearest point to the Cabeceiras do Luangwa along the course of this river till the Zambesi, and from the Zambesi until the spot where it is joined by the River Mussengueji; thenceforward the frontier of the new district is formed by the River Mussengueji as far as its source along the line of division formed by the waters of the Rivers Panhame and Luia, and by the bed of the Mazura until it meets the frontier of the district of Manica, coinciding with the same as far as the point in which the Mazura meets the River Sare; it then follows the bed of this river on the upper side, and it thence proceeds to Cabeceiras do Monfuli, alongside the bed of the latter as well as that of the Sanhati as far as the Zambesi, through which it continues to the westward."

The Royal Decree then proceeds to settle the provisional civil, military, and naval staff of the district; and the regular forces to be employed in it; and then lays down sundry other and necessary arrangements for a regular government establishment in a new district.

Lord Salisbury, as British Foreign Minister, having by a despatch dated 21st November, 1889, addressed to Mr. Petre, the British Minister at Lisbon, protested against the provisions of the above Royal Decree, the Protest was communicated to Senhor Barros Gomes, the Portuguese Minister for Foreign Affairs. In answer to this Protest Senhor Barros Gomes sent a despatch dated the 29th of the same month, to M. d'Antas, the Portuguese Minister in London. The following passages, extracted from this despatch contain a fair summary of the reasons on which the Royal Decree was based:—

"The original and historical right of Portugal to the possession of, and effective dominion over, those vast tracts of territory, is founded in the cession to her of the ancient Empire of Monomotapa, which took place in

1630, when Dom Nuño Alvares Pereira was Governor of Mozambique. This Empire extended from north-east to south-west, from the region where the Cafué meets the Zambesi, along the course of the Umnati, down to the ocean at Inhambane.

"As this province was divided into two provinces, Botonga in the east, and Mocaranga in the west, the dividing line between them being formed approximately by the course of the Mussengueji; and as the zone now called Mashonaland was an integral part of the second of these provinces, it is evident that the reasons which militate in favour of our claim to the whole of the Empire apply to every part of it as well, and therefore to Mashonaland.

"But the historical rights of Portugal are far from resting on this single act of cession by the Emperor, which was, in fact, nothing more than the acknowledgment of his own impotence, and the official termination of a long series of annexations carried out by the Portuguese towards the end of the sixteenth century; they are founded on that act which is in law of all acts of possession the most decisive, namely, the making and building of forts.

"Throughout Mashonaland their well preserved ruins are still standing." Senhor Gomes then proceeds to support this contention and to quote authorities in proof of this assertion. *Vide* pages 276 and 277 of the *London Gazette* of 17th January, 1890.

With regard to the territory situated north of the Zambesi, Senhor Barros Gomes refers to his reply of the 19th August, 1887, addressed to the British Minister at Lisbon, in answer to a Memorandum handed to him on the 13th of the same month, in which Lord Salisbury put forward the doctrine "that effectual occupation is now the condition essential to any recognition of dominion." He further states (*Ibid.*, p. 277 and 278): "In that note, I endeavoured to show that there is no provision of Inter-

national Public Law authorising such a doctrine to be applied to the interior of Africa. The Conference of Berlin restricted itself carefully to the coast regions. Were such a doctrine to prevail, it is certain that Germany could not maintain her sovereignty over her possessions south of the Cenene and the Zambesi, and west of Mombasa ; the Free State that of the Congo as far as Garanganja ; and England herself that of the region of the Equatorial Lakes, and even of the vast districts of Bamanguato and of the Matabeles, now included in her sphere of influence in South Africa.

" The very expression 'sphere of influence' now found in International documents issuing from all chanceries, and principally from those of England, is in itself the best proof that effectual occupation, as meaning the permanent establishment of authorities, cannot be held to constitute a condition essential to the recognition of possession by other nations." He then cites various authors in support of the exercise of acts indicative of Portuguese influence in the Shiré and Nyassa districts.

I have now to direct the reader's attention to the next stage of the Anglo-Portuguese difficulty. This refers to the complaints made by Lord Salisbury to Mr. Petre on the 17th December, 1889, and communicated by him to Senhor Barros Gomes on the following day. These complaints are fully narrated later on in the statement of the British case, but call for notice here with the view of giving the Portuguese answer to the British complaints. They have regard to the Portuguese expedition under Major Serpa Pinto in the neighbourhood of the Zambesi and the Shiré highlands.

Senhor Barros Gomes states, at pages 280 and 281 of the *London Gazette*, already quoted, that " the disturbed state of these regions is not a matter of recent date," and then proceeds to set forth the nature and extent of the information

which was at that time in the possession of the Portuguese Government in regard to the events which had occurred between the 15th June and the 31st August, 1889. He then gives (*Ibid.*, p. 281) a summary of what had taken place, as follows:—

“ 1. The Portuguese Government organised an expedition of a purely technical character, and unprovided with the requisite number of men for the purpose of waging war. Her Britannic Majesty's Government were aware of the nature of the expedition, and all the newspapers, including the English journals, alluded to it at the time without any objections being raised as to the spot where its operations were to be carried on.

“ 2. The successful result of the expedition was marred by the disturbances which took place on the Shiré, and later on, on account of the rumours spread and of the intrigues carried on for the express purpose of opposing it.

“ 3. The Portuguese expedition was attacked during the absence of Major Serpa Pinto, and did not attack.

“ 4. The attack took place to the south of the mouth of the Ruo.”

“ With respect to the mission in question, and to the reinforcements which Major Serpa Pinto went to fetch from Mozambique, explanations were at various times exchanged between the Government of His Most Faithful Majesty and that of Her Britannic Majesty, and I invariably declared that British subjects and settlements and properties would, under any hypothesis, be absolutely respected.”

Senhor Barros Gomes then states that in regard to the fighting which took place between the Portuguese expedition and the Makololos, and became known between the 17th and 19th November last, nothing was known in Lisbon beyond the telegram of the 17th of that month, and which became known in Lisbon and in all Europe. He also states that the Portuguese Government had asked for information from

Mozambique; and trusts (*Ibid.*, p. 282) that, especially with reference to the relation between Major Serpa Pinto and the British settlements, the reports sent from Zanzibar as to details will be found to be incorrect, considering the directions which were so pressingly enjoined by His Most Faithful Majesty's Government upon that officer.

In reply to the concrete points drawn up by Her Britannic Majesty's Government, he concluded this despatch by giving (*Ibid.*, p. 282) the following assurances:—

“1. His Majesty's Government never authorised and would not sanction any attack upon the British settlements at Nyassa and on the Shiré.

“2. It cannot be their intention to attack the territories belonging to Lo Bengula, but solely to maintain and defend themselves in the territories which they look upon as belonging to the Crown of Portugal, and where there are any chiefs either under the direct vassalage of or dependent upon Gungunhana.”

3. He then reserves to the Portuguese Government the right of forming a judgment “after they shall have read the full account of the facts as regards the proceedings of Major Serpa Pinto in the Makololo country.”

In the *Novidades*, published in Lisbon on the 16th December, 1889, a Report headed Mupasso, September 8th, 1889, by the Engineer-in-Chief of the Surveying Commission, to the Director-General of the Colonial Department of the Ministry of Marine and Colonies, Lisbon, it is stated that the command of the expedition was handed over by Major Serpa Pinto to the Engineer-in-Chief on the 23rd August last, and that on the 28th of the same month he was attacked by the Makololos near one of their villages in front of Mupassa at a distance of 1,200 metres from the bank of the Shiré; that he punished them for attacking him; that he crossed the river in order to join all his forces; and that he fortified his position with an earthenwork for

the protection of his sharpshooters. He proceeds to state (*Ibid.*, p. 283) that "in view of what I have above stated, His Majesty's Government must not fail to inflict a severe punishment upon those rebels," *i.e.*, the Makololo chiefs, "and thus free the Shiré once for all from the depredations and violence committed by these savages, and from the obstacles of every kind constantly placed in the way of civilization and of lawful trade by these unworthy Kaffirs, whom the abuse of alcohol has rendered completely beastly and barbarous." He then states, that "it is entirely impossible for this commission to carry out the work of survey and to continue to draw up the map of the hydrographic basin of the Shiré and its confluents, and of the Inhaneupata, Caruc, Spinda, and Chirongia Lakes, which fall into the Shiré, as well as of the corresponding orographical system, in which survey we were engaged; and it is quite certain that until the territory is cleared, we shall not be able to continue our work."

He concludes by stating that he hoped however, "not to return to Lisbon without concluding some important works here in addition to the pacification of this region and of its submission to the Crown of Portugal, by clearing the way to Nyassa, and by removing once for all the whole of the difficulties in the way of the passage of the lake steamers, and of the construction of the railway, for which purpose I will work as far as may lie in my power."

The assurances of the Portuguese Government to the British Government having been held by Lord Salisbury to be inadequate in the state of circumstances which had arisen, and categorical answers to the demands made by the British Government on the 18th December, 1889, having been required by Mr. Petre on the 8th January last, Senhor Barros Gomes wrote to Mr. Petre, on the last-mentioned day, in answer. He expresses regret that the evening of

the same day had been fixed by the British Government for his answer, and states (*Ibid.*, p. 285), "that as the Portuguese Government cannot, in any way, look upon the declaration of a Protectorate, in the terms in which it was made over a territory with respect to which the Crown of Portugal has constantly asserted its rights, and as the whole course of events, which are as yet incompletely known, is derived from these two capital points"—*i.e.* (1), the extremely limited *personnel* of the first expedition excluding the aggressive intention ascribed to it, and (2) the declaration of a British Protectorate being in respect to territory over which Portugal constantly asserted her rights—"it is possible that a different appreciation of the same facts may be the cause why the explanations and assurances which have already been given by the Government of His Most Faithful Majesty are held to be insufficient by the British Government."

He then proceeds, as he thinks, to comply with the demands of her Britannic Majesty's Government in the following terms:—

"The Portuguese Government, therefore, persevering in the same views"—*i.e.*, of arriving at an agreement upon all pending questions—"have likewise, on this occasion"—as well as previously—"no objection to issue instructions to their authorities at Mozambique in the sense that no act of force shall be committed, either against the British settlements on the Shiré and Nyassa (in accordance with the orders which have always been given) or against the country of the Makololos, or against the countries under the rule of Lo Bengula, or against any other country with respect to which it is alleged that a Protectorate has been declared on the part of the British Government, and likewise to the effect that no attempt is to be made to establish and exercise Portuguese jurisdiction in those territories, without

a previous agreement having been come to between the two Governments with regard thereto.

“ His Most Faithful Majesty’s Government, however, fully trust, on their side, that Her Britannic Majesty’s Government, on the score of a just reciprocity towards a friendly and allied Power from such remote times, will also issue a similar instruction to their authorities or Representatives in order that they may likewise abstain from any further proceedings that may alter the state of the pending question until the same shall have been finally settled by means of the agreement referred to by your Excellency’s note.”

He then promises not to endeavour to settle by force any territorial questions; and states that, if the above assurances do not satisfy the British Government, or if, contrary to his just expectations, a satisfactory agreement could not be arrived at as to the pending questions, the Portuguese Government would willingly submit “ all the pending disputes with Great Britain to the examination and decision of a conference of the Signatory Powers of the General Act of Berlin ” of 1885, Article 12, under which they placed themselves.

He concludes this despatch by stating (*Ibid.*, p. 286), that “ In truth, if England had recognised the historical right, as constantly asserted by Portugal, to the territories on the Shiré and Nyassa, no question would ever have arisen. The contestation of that right, and above all things, the declaration of a British Protectorate over those regions cause them, at least, as regards the British Government, to be fully comprised within the provisions of the said Article, in virtue of which mediation is obligatory, and arbitration is optional.”

On the 8th January last, instructions were sent by the Portuguese Minister to the Governor-General of Mozambique, in accordance with the terms of the despatch of Senhor

Barros Gomes of the same date. Also, on the same day, instructions were sent to him, asking him to state "what military forces or military stations have we got in the region of the Shiré and in Mashonaland ;" and, on an unspecified date, the Engineer on the Shiré telegraphed to the Portuguese Government in those words: "Serpa Pinto having withdrawn with the forces, I ask permission to engage porters for provisions and other service." This telegram was communicated to Mr. Petre by the Portuguese Government on the 11th January last.

Still the assurances of the Portuguese Government were held insufficient by Lord Salisbury, and Mr. Petre was instructed to demand a satisfactory reply by ten o'clock in the evening of the 11th January ; and, if no satisfactory answer was given him, then, to leave Lisbon on the arrival of the *Enchantress*, at that time stationed at Vigo. To this Ultimatum the textual reply of Senhor Barros Gomes has not yet been published. But, on the 12th January, a telegram was despatched from Lisbon by Mr. Petre to Lord Salisbury in these words: "I have this morning received a private note from the Minister for Foreign Affairs, conveying the decision of Portugal to yield to the demands of Great Britain. It states that orders will be sent to Mozambique in the sense of my Memorandum, and that I shall receive to-day a note informing me officially of the decision. This intimation is the result of a meeting of the Council of State last night under the presidency of the King." Later, on the same day, another telegram was despatched by Mr. Petre to Lord Salisbury, and was received next day, in the following terms :—

"I have received official note, referred to in my previous telegram of to-day. It contains a reservation of the rights of Portugal, and concludes as follows :—

"In the presence of imminent rupture of relations with Great Britain, and in view of all the consequences which

may perhaps result therefrom, His Majesty's Government have decided to yield to the demands recently drawn up, in the two Memoranda to which I refer, and His Majesty's Government, reserving, in every way, the rights of the Crown of Portugal to the African regions in question, and protesting also on behalf of the rights conferred upon them by Article 12 of the General Act of Berlin to have the matter in dispute definitely settled either by mediation or by arbitration, will send the orders required by Great Britain to the Governor-General of Mozambique."—*Vide London Gazette*, 17th January, 1890.

II. *The British Case.*

On the 16th November last, Mr. Petre sent to Lord Salisbury the Portuguese Royal Decree of the 7th of that month, and Lord Salisbury received it on the 20th. His Lordship wrote Mr. Petre on the following day in these terms:—

"In your despatch of the 16th instant, I received a copy of the Royal Decree which was published in the official Gazette of the 9th instant. It purports to place a large territory under Portuguese administration in the interior of Africa to the north and South of the Zambesi River. The district, to which the name of Zunbo is given, appears to comprise a great part of Mashonaland and an immense tract to the northward, approaching the frontiers of the Congo Free State and the watershed of Lake Nyassa. I inclose a map indicating the frontiers set forth in that Decree.

"I have to request you to remind the Portuguese Government that Mashonaland is under British influence, and to state that Her Majesty's Government do not recognise a claim of Portugal to any portion of that territory. The Agreement between Lo Bengula and Great Britain of the 11th of February, 1888, was duly notified to them in

accordance with the instructions given by me to Sir George Bonham in my despatch of the 24th July of that year. It was also officially published in the Cape Colony. The Agreement recorded the fact that Lo Bengula is Ruler of Mashonaland and Makakalakaland.

• "Her Majesty's Government are also unable to recognise the claims of Portugal to the territory to the north of the Zambesi indicated in the above-mentioned Proclamation. So far as they are defined, they follow the course of the Loangwa River, on whose banks there are tribes with whom Her Majesty's Government have Treaties, and they appear to be inconsistent with the British rights established by settlement upon the Shiré River and the coasts of Lake Nyassa. Beyond this they assert the jurisdiction of Portugal over vast tracts which are still unoccupied, but the knowledge of which is principally due to British explorers. You will refer Senhor Barros Gomes to the Memorandum which you placed in his hands, by my direction, on the 13th August, 1887, in which it was stated that Her Majesty's Government protested against any claims in no degree founded on occupation, and that they could not recognise the sovereignty of Portugal in territory of which she had not practically taken possession, and in which she was represented by no authority capable of exercising the ordinary rights of sovereignty. You will formally renew this protest. •

"You will inform his Excellency that Her Majesty's Government recognise on the Upper Zambesi the existence of Portuguese occupation of Tete and Zumbo, but that they have no knowledge of the occupation of any other place or district."

On the 26th December last, after an interval of three weeks from the receipt of the despatch of Senhor Barros Gomes of the 6th of that month by Lord Salisbury, his Lordship wrote in reply to Mr. Petre a despatch, from

which (*Vide London Gazette* of 17th January, 1890, pp. 279, 280, and 281) I make the following extracts:—

“ The Portuguese Minister for Foreign Affairs does not resist the pretensions of the British Government upon any assertion that the Portuguese Government has, in modern times, occupied, or colonised, or governed the regions to which the claim of dominion is advanced. Such a contention would have been impossible, for it is notorious that a large area of the territories of the Zambesi basin, and many of its remarkable features, were unknown to the world until they were revealed by the enterprise of Living-stone and other British explorers, and the only settlements which have been established in it, in recent years, are those of the British missionary societies and trading companies, which are formed upon the banks of the Shiré and the coasts of Lake Nyassa.

“ Researches have been made in this country, but hitherto without success, for the purpose of recovering the text of the Treaty with the Emperor of Monomatapa, on which such large consequences are based. In the absence of this documentary confirmation, we have at present no ground for believing that the Emperor himself professed or affected to convey the extensive territories which he is assumed to have surrendered on that occasion. Still less importance can be attached to forts whose “ well-preserved ruins ” have been discovered by recent explorers. They are believed by archæologists to belong rather to the beginning of the Sixteenth than to the Seventeenth Century; but whatever their origin, or the date of their construction, their existence in a condition of well-preserved ruin will hardly contribute much to the establishment of the sovereignty of Portugal. Forts maintained in a condition of efficiency are undoubtedly a conclusive testimony that the territory on which they stand is in the military occupation, and under the effective dominion, of the power to which they

belong. But forts which are in ruins, and which have neither been reconstructed nor replaced, can only prove, if they prove anything, that, so far as that territory is concerned, the dominion of which they were the instrument, and the guarantee, is in ruins also.

•“ The fact of essential importance is, that the territory in question is not under the effective government or occupation of Portugal, and that, if ever it was so, which is very doubtful, that occupation has ceased during an interval of more than two centuries. During the whole of that period the Goverment of Portugal has made no attempt to govern or civilise, or colonise the vast regions to which a claim is now advanced, and it may be said, with respect to a very large portion of them, that no Portuguese authority has ever attempted their exploration. The practical attention of that Government has only been drawn to them, at last, by the successful enterprise of British travellers and British settlers. The Portuguese authorities, during that long interval, have made no offer to establish in them even the semblance of an effective government, or to commence the restoration of their alleged dominion, even by military expeditions, until they were stimulated to do so by the probability that the work of colonising and civilizing them would fall to the advancing stream of British emigration. It is not, indeed, required by international law, that the whole extent of a country occupied by a civilized power should be reclaimed from barbarism at once; time is necessary for the full completion of a process which depends upon the gradual increase of wealth and population; but, on the other hand, no paper annexation of territory can pretend to any validity as a bar to the enterprise of other nations, if it has never, through vast periods of time, been accompanied by any indication of an intention to make the occupation a reality, and has been suffered to be ineffective and unused for centuries. Her Majesty's Government are

unable to admit that the historical considerations advanced by Senhor Barros Gomes can invalidate the rights which the British missionaries and traders have acquired by settlement in the valleys of Nyassa and the Shiré, nor can they affect the lawfulness of the protection which has been long extended by Great Britain to Lo Bengula, and more recently to the Makololos..

“ Her Majesty’s Government, therefore, cannot but look upon any attempt to exercise Portuguese dominion over the British settlements, in the districts of Shiré and Lake Nyassa, or over any tribes which are under British protection, as an invasion of Her Majesty’s rights.”

These two despatches, which I have practically quoted in full, show the grounds upon which the British Government declined to acknowledge the validity of the alleged Portuguese historical claims in East and Central Africa. I must now refer to another aspect of the case, and which led up to the Ultimatum of the 10th January, 1890.

On the 17th December last, Lord Salisbury wrote to Mr. Petre a despatch, which was communicated to Senhor Barros Gomes, “in regard to the Portuguese expedition under Major Serpa Pinto in the neighbourhood of the Zambesi and Shiré Highlands.” Having already given the Portuguese account of what had taken place, I do not propose here to give the British account which reached Lord Salisbury from Colonel Euar-Smith, Her Majesty’s Agent and Consul-General at Zanzibar. These two accounts differ, in important particulars, as to the events which occurred on the Shiré River; but they essentially agree in stating that warlike operations had there taken place, and that the Portuguese were doing all they could to bring the territory under the effective dominion of the Portuguese Crown. Against all such operations of the Portuguese expedition, Mr. Petre was instructed by Lord Salisbury to protest on behalf of the British Crown.

With regard to the assurances, contained in Senhor Barros Gomes's reply to Mr. Petre, Lord Salisbury wrote on the 2nd January last to Mr. Petre a despatch, of which the following extracts contain the substance :—

“ Her Majesty's Government have given Senhor Barros Gomes's note their careful attention; but they regret that they do not find in it those precise and explicit assurances for which you were instructed to ask, and which they consider it essential to obtain.

“ Senhor Barros Gomes endeavours to justify the conduct of the Portuguese commander in refusing to recognise the declaration made to him by Mr. Buchanan that the Makololos had been placed under British protection. You should point out that Mr. Buchanan, as Acting British Consul, was the Representative of Her Majesty's Government upon the spot. If Major Serpa Pinto thought that the British Representative had, in the action taken, exceeded his powers, his proper course was to have referred to his own Government, in order that they might ask for a disavowal of that action. To refuse the declaration, and to act in direct defiance to it, was totally unjustifiable, and was opposed to the universal practice which governs the relations of civilized and friendly States in international disputes.

“ Her Majesty's Government have not asked for any apology for what has taken place. They are quite willing to leave to the Portuguese Government the right claimed by Senhor Barros Gomes, of forming a judgment as to the Portuguese officers after receiving a full account of the facts. But they must insist on a prompt and distinct assurance that there will be no attempt to settle territorial questions by acts of force, or to establish Portuguese dominion over districts in which British interests predominate. If Her Majesty's Government cannot obtain such an assurance from the Portuguese

Government, it will be their duty to take the measures which they consider necessary for the adequate protection of those interests."

His Lordship concluded by an instruction "to repeat to Senhor Barros Gomes a categorical request for an immediate declaration from the Portuguese Government that the forces of Portugal will not be permitted to interfere with the British settlements," therein enumerated as under British protection; "and, further, that there will be no attempt to establish and exercise Portuguese jurisdiction in any portion of these countries without previous arrangement between the two countries," and to request that "you may receive an answer before the evening of the 8th instant." (*Vide London Gazette*, of 17th January, 1890, pp. 283 and 284.) This despatch was accordingly communicated to Senhor Barros Gomes. But, on the 4th January last, Lord Salisbury received a telegram from Acting-Consul Churchill, at Mozambique, confirming the engagement between the Portuguese and the Makololos in November, 1889, and stating that the "Company's," *i.e.*, the African Lake Company's "flag lowered under compulsion, because Shiré considered Portuguese," and "Andrade returned coast, enrolled large expedition, report says to plant flag where Portuguese have claims between Sofala and Matabele, and check English expedition to Matabeleland. A Governor is now established at Zumbo." With this telegram, and with Mr. Petre's suggestion as to an assurance "as to the immediate withdrawal of all Portuguese forces to this side of the Ruo," contained in a note, dated 8th January last, by Mr. Petre to Lord Salisbury, before his Lordship, I am not surprised that Senhor Barros Gomes's assurances, on the last-mentioned day, to Mr. Petre were held by the British Government not to be quite sufficient. (*Vide London Gazette* of 17th January, 1890, pp. 284 and 285.)

Accordingly, on 9th January, 1890, Lord Salisbury wrote to Mr. Petre in these words:—

“I have to state that Her Majesty’s Government are glad to learn that the reply of the Portuguese Government, in principle, meets the demands which you are instructed to make.

“Before, however, it can be accepted as satisfactory, Her Majesty’s Government must know that explicit instructions have been sent to the Portuguese authorities in Mozambique applying to the acts of force and exercise of jurisdiction which are now taking place, and which have already formed the subject of complaint on the part of Her Majesty’s Government, as well as to any further proceedings of the same nature. This would include the withdrawal, below the Ruo, of the authorities and forces now in the country of the Makololo, and the removal of all military stations in Matabeleland and Mashonaland.

“You will inform Senhor Barros Gomes of this despatch, and request him to furnish you, for communication to Her Majesty’s Government, with copies of the instructions sent to the Mozambique authorities.” (*Vide London Gazette*, 17th January, 1890, pp. 285 and 286.)

On 10th January, 1890, Lord Salisbury sent to Mr. Petre a despatch, with a copy of Mr. Churchill’s telegram of 4th of the same month, and requested him to state that orders must be immediately sent by telegraph to the Governor at Mozambique, “instructing him to withdraw all Portuguese troops that are on the Shiré, or in the Makololo country, or in Mashonaland,” and sending Mr. Petre the following order:—

“If you should not receive a satisfactory reply by ten o’clock on the evening of the 11th, you will send a telegram to the captain of Her Majesty’s ship *Enchantress*, now at Vigo, requesting him to proceed to Lisbon at once. If, on her arrival, you should still be without a satisfactory

answer, you will withdraw Her Majesty's Legation, and leave the archives in the charge of the Acting Consul." (*Vide London Gazette*, 17th January, 1890, p. 286.) The effect produced by this Ultimatum was, as I have already stated, the decision to yield to the demands of Great Britain, but under the reservation also already stated in this Article.

I conclude my quotations from the official correspondence contained in the *London Gazette*, with the terms of the telegram sent by Mr. Churchill to Lord Salisbury on 11th January last, and received by his Lordship on the same day. The words are these:—

"Mozambique, January 11, 1890, 10.30. A.M.

"To day's official Gazette contains Act of Vindication of Rights. States M'lauri surrendered to Portuguese; Katunga and other Makololos swore allegiance; Governor declared to them Portuguese resumed possession of entire basin and region, and will administer them forthwith."

The readers of this *Review* are now, I submit, in full possession of all the facts required for a sound, impartial and legal decision in regard to the recent Anglo-Portuguese dispute. But I shall, at a later stage, lay before them some additional facts which will enable them more clearly to understand the great and vital question which has arisen between the two friendly and allied powers. Before I proceed to do so, I shall very briefly sum up the whole of the material contentions of both the British and Portuguese Governments in this matter, as proved in the preceding pages.

III. *The Portuguese Contentions Briefly Stated.*

1. The right to establish a new district in the Province of Mozambique on the north and south sides of the Zambesi, and within which, as they allege, they had constantly asserted their rights.

2. The right of dominion on the south of the Zambesi under a cession by the Emperor of Monomotapa in 1630, and acts of possession following thereon, namely the making and building of forts whose "well preserved ruins" are marshalled in evidence. •

3. The right of dominion on the north of the Zambesi, founded on "the sphere of influence" of the Portuguese and the acts indicative of such influence in the Shiré and Nyassa districts.

4. The acts of the Surveying Expedition in 1889 as indicative of present or future efforts at the establishment of Portuguese dominion over the native tribes on the north of the Zambesi.

5. With regard to the Surveying Expedition, the Portuguese Government informed the British Government that it was entirely of a peaceful, and not of a warlike character, and that it was attacked on Portuguese territory by the native Makololos, whom they claim to consider as rebels for so attacking it.

6. The Portuguese Government never attacked, and never intended to attack, British settlements at Nyassa and on the Shiré, and had no intention of attacking Lo Bengula's territories.

7. They maintained themselves solely in the territories which belonged to the Crown of Portugal, and which were under the vassalage of, or dependent on, the chief Gungunhana.

8. The Surveying Expedition, as a matter of fact, did attack the Makololos, who were under the protection of the British crown, and affected to take the submission of some of the Makololo chiefs to the Crown of Portugal, and, as I hold, finally intended to clear the way to Nyassa.

9. On the 18th December, 1889, they promised to the British Government that no act should be done by them in territories where a British Protectorate had been declared

within the district in question, and that they would exercise no act of jurisdiction in the same, without a previous agreement between the two Governments, and asked for a reciprocal undertaking, which was never given, or discussed, by the British Government.

10. On the 12th January, 1890, the Portuguese Government, as they allege under coercion, agreed to withdraw all their forces from the Shiré and Nyassa districts for the present and all future time, but under a reservation of all the rights of the Crown of Portugal in the African regions in question, and appealed to the Great Powers for mediation or arbitration under Article 12 of the Berlin Treaty of 1885, and undertook to send orders to the Portuguese Governor of Mozambique in accordance with the British Ultimatum.

IV. The British Contentions Briefly Stated.

1. A general repudiation of the Portuguese right to establish dominion within the boundaries of the new District, and an allegation of ignorance of the Emperor of Monomotapa's cession in 1630.

2. Mashonaland was under British influence ; and there was an agreement by Lo Bengula, the Ruler of Mashonaland and Makakakaland to the British Crown on the 11th of February, 1888, and intimated to the Portuguese Government on or about, or soon after, the 24th of July of the same year.

3. The rights claimed by the Portuguese on the North of the Zambesi are in violation of the Treaty Rights of Her Majesty's Government with the Native Tribes, and are also inconsistent with British rights and establishments upon the Shiré River and the coasts of the Lake Nyassa, and the Portuguese forts have long been in ruins.

4. On or about the 13th August, 1887, the British Government informed the Portuguese Government that they would not recognise Portuguese rights of dominion or

sovereignty in no degree founded on occupation, or on the exercise of the ordinary rights of sovereignty. Subsequently, the British Government acknowledged that the Portuguese had lawfully occupied and held Tete and Zumbo, on the Upper Zambesi.

•5. The Zambesi basin had been explored and made known to the world by Livingstone and other British explorers; and the only European settlements established in it, in recent years, had been established by British Missionary and British Trading Societies on the Shiré and Lake Nyassa.

6. The Portuguese Expedition had made war on natives under British protection, and had obtained their submission to the Portuguese Crown, and threatened war, if necessary, against the natives under British protection, and on the north of the Zambesi.

7. The Portuguese did not have effective possession of the territories in question, and over which they claimed sovereignty or dominion, as shewn by the Royal Decree of the 7th of November, 1889; and never colonised, or governed the said territories, or even explored them to any great extent.

8. Substantially the same as the 8th brief contention of the Portuguese.

9. The undertaking by the Portuguese of the 18th of December, 1889, was inadequate, and was accordingly rejected; but, as a matter of fact, its terms were ignored by the Portuguese Colonial authorities, as shown by the Proclamation of the Governor of Mozambique on 11th January, 1890.

10. The dispute which has arisen does not come under the Treaty of Berlin before-mentioned. It is merely a matter for amicable discussion and settlement between the two friendly and allied Governments; but, subject of course, to an appeal to war for a final and barbarous settlement of the dispute.

From the preceding brief statement of Portuguese and British contentions, the reader will, I hope, see, at a glance, the various allegations of Fact and Law raised by the British and Portuguese Governments. Briefly, the British Government asserts that the discovery of Africa by the Portuguese gives to them no sovereign rights over the territory proposed to be created into a new district as a part of the province of Mozambique; that the Portuguese had acquired no rights over it by cession or occupation; that the British claims to the territory to the north and south of the Zambesi belonged to Britain by cession, occupation and influence.

V. The Law of Nations Applied to the Facts.

Now, firstly, discovery alone cannot give right to the whole continent of Africa. This proposition is undeniable; is laid down in the elementary works of international writers; and is demonstrated by the actual condition of Africa at the present moment. Secondly, no evidence has been produced of the alleged cession of the disputed territory by the Emperor of Monomotapa in 1630. It must, therefore, be held that no such cession ever took place. But, for the sake of argument, let it be granted that the cession was made, the question remains as to its extent and its validity. Against its validity, a fatal objection arises from the fact that, from the time it was granted till the present time, or for a period for more than 250 years, nothing has been done by the Portuguese to make it effectual. To allow a grant, made more than 250 years ago, and upon which no possession has been taken, to have effect now would be absurd, and contrary to every principle in regard to the acquisition of private or public rights over any kind of property. Thirdly, the Portuguese have not acquired the ownership, or the protectorate, over the territory in dispute by any act of occupation, or cession, or influence prior to the British rights asserted

and known to the Portuguese. As a matter of fact, the Portuguese possessions in Africa are well known, and have long been so, and with the exception of Zumbo and Tete, never extended to any great distance beyond the coast lines of Western and Eastern Africa. All the reliable maps in the world show this to be the case; and no Portuguese Government, traveller, trader, or missionary ever pretended, till quite recently, that the disputed territory belonged to the Portuguese nation. On the other hand, Great Britain asserts her claim to the territory in dispute on the ground that the territory has been effectually placed under her protection by virtue of the Agreements with Lo Bengula, M'lauli, and the Native Chiefs to the south and north of the Zambesi, and duly intimated to the Portuguese Government, and previous to any attempted Portuguese occupation in modern times, and of the trade long established in and around the disputed territory, and of the civilising influences long exerted there by her missionaries and explorers—e.g., Livingstone, Moffat and Stanley. No doubt, Major Serpa Pinto in 1877 and 1878 visited and described the disputed territory, and pointed out the great field for industrial, colonial, and missionary enterprise there to be found. But he never asserts any Portuguese claims to the territory; but everywhere, in his interesting, yet somewhat vain-glorious book of Travel from the Congo to the Zambesi, refers to the disputed territory as under native chiefs in no way subject to the sovereignty, or protectorate of Portugal. There was a time when the native chiefs and States of Africa, with their territories and subjects, were treated by the Europeans as if they had no natural or national, no public or private rights. But that time is past and gone, and African Chiefs and States are treated as possessed of private as well as public rights. Where a question of cession or protectorate arises in Africa, a right prior in date, and clothed with all the neces-

sary and usual formalities of possession, and intimation to parties interested, is always preferred to a claim of posterior date, or not duly followed by the customary formalities established by the Law of Nations. Hence, from an International point of view, the British claim to the territory in question is clearly to be preferred to the Portuguese claim.

Here I might bring this Article to a conclusion. It is true that the British claim might be still further strengthened by a few quotations from some of the great writers on International Law, and by a statement of the invariable practice of all civilized countries. As, however, this Article has already occupied so much space, and the Law on the subject is well known to all students of the Law of Nations, I will merely refer to the following authorities, which the reader may consult at his leisure, namely:—Vattel, *Droit des Gens*, I., § 208; Phillimore's *Commentaries on International Law*, §§ 226 to 258; Hall's *International Law*, § 30.

With regard to the Portuguese claim for arbitration or mediation, I hold that it is utterly untenable; because the Berlin Act of 1885 does not apply, and never was intended to apply, to the circumstances which have arisen in the present dispute.

I now proceed to state some additional facts in support of the British claims here involved, by way of conclusion to the present Article.

VI. *Additional Statement of the British Case against the Portuguese Government.*

Some writers have attributed a military character to the late Portuguese Surveying Expedition. Being here engaged in an exposition of the International relations arising out of that expedition, I have refrained from entering upon the region of conjecture as to its object. But, so far as

Portuguese policy in South Eastern Africa can be conjectured, it appears to me to have been to occupy and possess a belt of territory stretching across the African continent from Angola on the west to Mozambique on the east, and to cut off our power to extend our South African possessions from south to north, and to place our Central African Missions and Trading settlements in a state of subjection or of isolation. This was a policy which we were entitled to oppose, and which we are certainly not obliged to tolerate, unless by necessity or the principles of International Law. I have, therefore, taken the facts clearly proved by the Diplomatic correspondence on the subject, and merely applied the Law of Nations to the facts demonstrated in the correspondence. But the subject would be imperfectly treated, were I not to give the terms of the Declaration of 21st September, 1889, by the British Consul at Nyassa, and duly intimated to Major Serpa Pinto before his attack on the Makololos. This declaration was published in the *Times* on 21st January last, and is as follows:—"To all whom it may concern. I hereby declare that the Makololo, Yas, and Machingo countries, within the limits cited below, are with the consent and at the desire of their chiefs and peoples, placed under the protection of her Most Gracious Majesty the Queen of Great Britain and Ireland, Empress of India, Defender of the Faith, &c. Given at Mlomba, Makololo country, the 21st of September, 1889. The above Declaration applies to the countries included within the following boundaries, commencing on the left bank of the Lower Shiré River at its confluence with the Ruo River, and following the Ruo to where it takes its rise in the Milangé mountains to the most southerly point of Lake Shirwa, and northward along its eastern shores, including the northern slopes of the Zumbo and Molosa Mountains, to the Upper Shiré River on the

right bank of the Lower Shiré River. The boundary commences at the lowermost point of the Makololo country, and at present opposite Mpssa's. This point, however, is subject to arrangement by Her Majesty's Government, and follows the Shiré at a distance of fifty miles inland from the river till it meets the Lisungwi River." This Declaration bears the seal of her Britannic Majesty's Consul at Nyassa. Roughly speaking, the Protectorate thus publicly announced appears to extend over the territory from the junction of the River Ruo and the Shiré to the north of Lake Shirwa. It, therefore, practically comprehends the whole of Makololo, Yas, and Machinga countries, and consequently the Blantyre district, and the Shiré Highlands. Such a cession as is here indicated was within the power of the African chiefs and natives to make to us. Of course, I need scarcely observe that this Protectorate does not extend to Lake Nyassa, which must be the subject of other arrangements, which, in all probability, have already been effected. Now, from the Royal Portuguese Decree and the Proclamation of the Governor of Mozambique, both already quoted, it will be seen that the rights claimed by the British and Portuguese Governments are inconsistent and contradictory—which of the two claims is lawful, and will stand good, is the problem that I have attempted to solve by the Law of Nations.

The position which we have taken up in this matter, and which we are prepared to defend, not as by right of conquest, but by the lawful invocation and bestowal of our Protectorate, may, perhaps, have destroyed the dreams of a vast Portuguese Empire in Central Africa, stretching on both sides of the Zambesi, and covering many thousands of square miles of territory. But who are to blame for this result? The Portuguese themselves, who have been for more than three centuries in Africa, and have neither governed nor subdued the Natives of the Interior; who have misused and

abused the opportunities which they possessed in the neighbourhood of that region; and who have been constantly falling back in the race to bring it within the sphere of civilisation. Still, so far as we have acknowledged the Portuguese claims on the south or on the north of the Zambesi, we are bound and are willing to admit them as fully and freely as we have ever done. Dr. Livingstone rightly called the Zambesi the gate of Central Africa. Hence it is not surprising that the Portuguese Government were informed by the British Government that their claimis, lately set up, to the south of the Zambesi, or to the north of it—e.g., the district through which the Loangwa flows—would not be admitted by the British Government; because such claims were inconsistent with British rights acquired and established by our settlements on the Shiré River. The River Loangwa, I may here observe, is an affluent of the Zambesi, and, to all intents and purposes, flows in a direction from North to South. The Portuguese Government may rest assured that the traders on Lake Nyassa, will not be abandoned by us, but will be protected and encouraged from the basis of our possessions in the south. That we ought to maintain and defend this position is shown by the latest discovery by Stanley, who asserts that Lake Nyassa, on which float British steamers, is connected with Lake Tanganyika, by a practicable highway, known as the famous Stevenson Road. Nay, more, it was found, during the Emin Pacha Relief Expedition, that the great Lake discovered by Stanley in 1877, and now named Albert Edward, and which is separated from the head of Lake Tanganyika by nearly the same distance as that between Tanganyika and Lake Nyassa, is one of the sources of the Nile, and that a broad stream flows into the Albert Nyanza from the Victoria Nyanza. Moreover, the British East Africa Company's territories include Lo Bengula's country, which comprehends Mashonaland as well as

Matabeleland, and touch Lake Victoria, whose waters are navigated by British steamers. Hence, Nyassa, in regard to which the British Government now recognise British interests, and the Lakes Tanganyika, Albert Edward, Albert and Victoria are all links in a chain of water communication, which can be made to connect with our settlements on the Zanzibar coast, and possibly with the Nile, and also with our South African possessions. While, therefore, Great Britain can, as I hold, defend her position on principles of International Law, she is called on to pursue a policy which can be defended on the principles of prudence, justice, and humanity.

The Zambesi and the Shiré districts were practically discovered by Dr. Livingstone. For 14 years the Church of Scotland has maintained a flourishing Missionary station at Blantyre on the Shiré; and the missionaries of the Free Church of Scotland have long laboured on the western side of Lake Nyassa. In the same neighbourhood, there is the Universities Mission, established in 1861 by the Universities of Oxford and Cambridge, and originated by the urgent and fervent appeals of Dr. Livingstone made to the people of this country to engage in Missionary enterprise in South Equatorial Africa. This Mission has been for some time superintended by Bishop Smythies, and its workers recently preferred to remain at their posts rather than secure their absolute safety by a retreat at a time when the late territorial differences between Great Britain and Portugal might easily have ended in a war of races in Central Africa, or in a great European conflagration. At its origin, this Mission appears to have been established on the supposition that the Africans will, or can, be satisfied, in a barbarous state, with spiritual nourishment only. This supposition, however, is a pure delusion, and a serious error of some good natured Christians and philanthropists. It has had to be superseded by a truer and more philosophical doctrine

to the effect that the material wants of the barbarian, as well as the spiritual, have to be gratified before any satisfactory or substantial progress is made in Christianising or civilizing him. The true Missionary required for Africa is the man who is able to promote agriculture, commerce, and education, and to shew forth, by example and precept, the great doctrines and the customs of cultivated and civilised nations as well as to teach the glorious and exalting doctrines of the equality of all men before God, and the sublime truths of Christian self-sacrifice, and of perfect trust in the great common Father of all mankind. The savage, as we know to our cost in Africa and elsewhere, is totally ignorant of the principles by which the Christian man, or nation, is guided. To civilise Africa without the Gospel has hitherto been, and in future will be a failure. Still, where Christianity has been successfully introduced, there has been an entire revolution in the habits and character of the people. Of these propositions the Basutos afford a striking example. Although the work be slow, we must not abandon the civilisation of the Dark Continent, for which we have done so much already. "What wisdom and meekness," says Moffat, "are required of him who would sweep away centuries of lies ; prostrate false idols ; and abolish useless rites and ceremonies in the Christian religion ; and transform a barbarous and savage people into civilized men and women, and establish a new system of Government ; and, in brief, 'to turn the world upside down.' The dawn of civilization has arisen on Africa. May it increase till it gives light to every part of it in all the strength and power of Meridian glory."

Inasmuch as the terms of the Agreements between the British Government and the African chiefs and natives have not yet been published, and are not known to me, I must assume, till the contrary is proved, that the British Protectorate was justified by these Agreements, and that it was

sanctioned by the British Government. I beg, however, here to point out that the Protectorate thus bestowed, does not, in the least degree, appear to deprive the native chiefs and tribes of their rights of sovereignty, or of their lands. The Protectorate merely throws the ægis of Great Britain over them and their respective countries against foreign aggression. A 'Protectorate of the nature here disclosed does not annex the territories protected. But, granting that the concessions by the African chiefs and tribes do not place the territories in dispute under the sovereignty of Britain, this admission does not give the territories to the Portuguese; for their discovery of Africa, some four centuries ago, is not enough for such a purpose, and they have never had continuous or effective or even partial possession of the territories. Indeed, great political revolutions have actually taken place in the territories in question, and the sovereignty over them has been changed several times since their alleged grant to Portugal in 1630. Further, the Portuguese can show no civil or military administration set up by them, or actual dominion acquired by them in Central Africa, between their actual East and West Coast possessions; and no reliable maps ever executed, or delimitations made, shew that they had any possessions in the Interior of Africa. All that they can shew they have done is that the country has been traversed by some of their adventurous explorers, and by some of their religious persuasion and country, and they have not left any substantial proof of their claims in any other way.

The great map of East Africa by the Royal Geographical Society of Lisbon, published at Paris in 1886, shews that the Portuguese never, at any epoch of their history, exercised authority, or held posts, either in the Shiré Valley, or in the country round Lake Nyassa; and the exhaustive examination of the subject by Professor Batalha Reis, on behalf of the Portuguese Government, may be cited in confirmation of this proposition. No doubt the Portuguese had some knowledge of

Nyassaland 250 years ago. But in 1859, Bordalo, the Portuguese historian of Mozambique, says: "The Shiré runs through the country of Maravia, but of whose origin we are ignorant." Further, the confluence, which is the entrance of the Shiré Valley, of the Rivers Shiré and Zambesi, was recognised by the Mozambique Tariff in 1877 as the point beyond which the Portuguese had no jurisdiction in that region; and the River Zambesi, now no longer free, was declared free to all nations. In consequence of this condition of affairs, British subjects, who had interests in Nyassaland, commenced to use and establish Steam Navigation on these two rivers; and the African Lakes Company established a substantial station at Mandala, and purchased a steamer for navigating Lake Nyassa, and extended their stations northwards along this Lake, and towards Lake Tanganyika. Soon afterwards, a British Representative was formally appointed for the Shiré district, and established himself in the neighbourhood of Mandala and Blantyre in the Shiré Highlands, and subsequently about 40 miles northwards. During the last 12 years, £150,000 have been expended by the African Lakes Company in developing the country by roads and steamers, and training the natives to industry. On the other hand, the Portuguese, within a few years of the erection of the African Lakes Company, erected a fort in the Shiré Valley, and at a place about 80 miles northwards, and on the left bank of the River. Subsequently, Portugal tried to introduce regulations to compel vessels navigating the Zambesi to use the Portuguese flag only, and be manned by Portuguese, and she completely failed in her attempt. Therefore, I suggest, and personally hold that a Portuguese Policy of annexation in Central Africa was begun several years ago, and must now be finally stopped.

I am aware that the Portuguese Government at Lisbon assert that they did not authorise Major Serpa Pinto

to attack the Makololos, unless as a defensive measure, and also that they never authorised his annexation of the Makololo territory. But that some annexation by the Portuguese was contemplated, in virtue of some, as yet, undisclosed, unpublished, and perhaps indefinite instructions given to Major Serpa Pinto, or to the Commander of the Surveying Expedition, is, from several circumstances, highly probable. I shall only here refer to the reluctance of the late Portuguese Government to comply with the demands of the British Government to recall the Surveying Expedition, to the protests and disturbances in Portugal against compliance with, and in denunciation of those demands, to the arguments set forth by the late Portuguese Government in answer to Lord Salisbury's despatches, and to the reservations by the late Portuguese Government in regard to the territory in dispute as belonging to the Portuguese Crown.

Assuming that the Portuguese Government at Lisbon did not know of Major Serpa Pinto's repudiation of the British Protectorate over the Makololos, it was, unless the Major had instructions from his Government to justify his conduct, his bounden duty to obtain the instructions of his Government for his future guidance as soon as the British Protectorate was made known to him. If the Major had the requisite instructions, the Portuguese Government acted in bad faith towards the British Government; and if he had not such instructions, his Government must be held responsible for what he did as their Agent. I have here to observe, however, that, from first to last, the Portuguese Government have acted, and have defended the conduct of themselves and of their agents in this matter, as if they had all acted within their rights, and that they never departed from that position until they were compelled to abandon it in order to avoid the dangers and calamities of war. In my opinion, the

attack on the Makololos and the invasion of their territory by Major Serpa Pinto's forces was a deliberate and intentional act of aggression against Great Britain in South Eastern Africa. Months before that attack, the Portuguese had been attacking and ravaging and plundering the territory of the natives below the Ruo, and had excited the natives above the Ruo against them.

The fact is that, for sometime past, the Portuguese, as well as ourselves, have been entering, or endeavouring to enter, upon a new course of policy in South-Eastern Africa. In particular, I am inclined to point to the early part of the year 1879, when the King of the Belgians began to interest himself in the operations of the International African Association on the Congo, as the time when the Portuguese began seriously to enter into this contest with us in South Africa, and I now suggest that this contest has never since ceased, and has been continued either in West or East Central Africa. The problem which has now to be settled is whether they, or we, have made our policy effective according to the recognised principles of International Law.

Clearly, no great and independent nation can allow its flag, the symbol of its power and greatness, to be taken down, or ordered to be taken down, by a foreign country, where it has been erected by a public officer acting within the scope of his express, or implied, authority. Nor can it allow those under its protection to be attacked by another great and independent State; nor can it permit its influence to be set aside in its own possessions, or in the regions under its protection. The concentration of a British Fleet in or near Delagoa Bay and another in the Mediterranean to enforce our rights and claims for reparation against Portugal was, therefore, at once prudent and patriotic, and greatly increased the chances of a peaceful and reasonable settlement of the dispute. That there was undue severity

or unjustifiable coercion exercised against Portugal appears to me to be a suggestion utterly unfounded.

The British Government are as anxiously desirous of an amicable and friendly settlement of the dispute which has arisen as the Portuguese can be. But in one form or another, the Royal Decree of 7th November, 1889, must be revoked, or abandoned, and the vast territorial claims therein attempted to be set up must be formally and completely abandoned. The attainment of such an amicable settlement ought not to be a matter of great difficulty, and might easily be made by an inland extension of Portuguese territory on the east or west coasts. In December last, Lord Salisbury merely asked the Portuguese not to decide territorial questions by an armed force; but on the 9th January, his Lordship peremptorily and properly insisted on the withdrawal of the so-called Portuguese Surveying Expedition from the disputed territory. The matters in dispute, are, therefore, still open for further Diplomatic negotiations. But, whatever amicable arrangement may be made between the British and Portuguese Governments, our claim to have a clear highway through Africa from south to north must be secured and protected against all menace, or danger, from the Portuguese for the future. So far as there are any difficulties about the delimitation of territories to be settled, there does not appear to be any obstacle to their being removed, and finally determined on the spot by a Joint Commission of British and Portuguese Delegates. But, before such a commission could act in a satisfactory manner, the two allied Governments must, first of all, arrange and settle the general principles upon which the Commission would be authorised to act. In Africa, it must never be forgotten that there is ample scope for the energies, capacities and talents of all European nations, whether great or small, in a mission of civilisation and industry, and,

in that mission, the British Government have given abundant evidence of their desire to give a fair field to all.

On the 20th of April, 1850, Viscount Mon wrote to Lord Palmerston as to the Portuguese African possessions in the following terms: "The importance of the Portuguese African possessions is a fact incontestably acknowledged by everyone, and your Excellency was pleased to tell me that you were glad to hear of the growing importance of those possessions, and that my Government was earnestly endeavouring to improve their condition, or the sources that might be derived from them." Forty years have elapsed since then, and the world has, in general, made rapid strides in civilisation and commerce and industry; and yet the Portuguese African possessions are in such a state of backwardness, poverty and debt as to be a disgrace to any civilised European community. However, the civilisation of Africa is no longer exclusively in the hands of the Portuguese or the Dutch, and it will now go forward in an accelerating ratio every year, every month, and every day of every coming year.

Still, the British Government must now define the exact extent of their sphere of influence in South-Eastern Africa, and be prepared to defend it. They must, at all events, fulfil their obligations, of which protection against injury is certainly one, to the natives who have placed themselves under our care, and they must not allow foreign nations to usurp British authority, or supplant British jurisdiction, when lawfully established. Till lately, they gave no official support to the missionaries, and traders, and natives, on the south and north of the Zambesi. They must now make clear that their intention is to protect them to the utmost of their power. At present, no Government exists there, except the barbarous government of the native chiefs. The door of Central Africa was opened by Dr. Livingstone. It has been used largely and well by our missionaries and

traders. It must now be held by the firm and resolute hands of the public officials of this country; and, if necessary, we must support our own officers and delegates by an armed force. To allow the Portuguese Government to occupy and possess the territory on the south of the Zambesi, and subject it to their sovereign dominion, as they unquestionably, I think, proposed to do, even although in the fullest degree they were prepared to recognise our settlements and missions within it, is now inadmissible, and must be strenuously opposed as contrary to law and policy. In point of fact, the pretensions set up by the Portuguese that they have a more substantial influence than the British in the Zambesi district cannot be maintained, or plausibly defended.

Further, although, of course, I must admit that a Portuguese influence of a certain kind did extend far beyond the territories occupied by the Portuguese, yet, such influence was not of so public, sovereign, or international a character as to establish a Portuguese sovereignty, or protectorate, suzerainty, or any form of jurisdiction, or dominion known to the Law of Nations. As I have several times already stated, and as I must again state, in regard to our own and the Portuguese claims of sovereignty, dominion, or protectorate, neither the influence nor residence of Missionaries or Traders, nor the settlement of Colonists, can of themselves establish sovereignty, protectorate, or suzerainty. To give sovereignty, there must be a lawful and national appropriation of territory, and the establishment of a government suitable to the necessities of the territory erected into a separate and independent State. To establish a protectorate or a suzerainty, there must be the submission of an independent State, or body of men, occupying a defined territory, to another independent State, in consideration of protection on the one hand, and submission on the other.

I do not propose to introduce the Treaties of 1879 and 1884 between Great Britain and Portugal into the consideration of the question before me; because those Treaties were never ratified, and are based on mutual concessions and compromises as much as on the recognition of special rights belonging to the one nation or the other. Whether rightly, or wrongly, the British Government have, in fact, treated the River Ruo as a point beyond which the Portuguese ought not to pass. Let us treat this matter as we please, the question of policy cannot be altogether excluded from consideration; because the dispute has originated from an essential difference of policy lately adopted by both of the opposing parties. As the King of Portugal said in the Portuguese Cortes on 2nd January last, "The patriotic aspirations of British subjects are opposed by the fixed designs of Portugal." He further said, "My Government, inspired by national sentiment, acting in compliance with the wish of the two Chambers, has endeavoured to convince Her Majesty's Government of the right whereby Portugal rules over the countries to the north and the south of the Zambesi." Here, be it observed, there is no repudiation of Colonial officials acting beyond their authority, but a direct and explicit enunciation of Portuguese claims asserted in the Royal Decree of 7th November last. When King Carlos publicly expressed such sentiments, I cannot doubt, for a moment, that the Portuguese firmly believe that those countries belong to them, and not to us, or to our *protégés* the native African chiefs and tribes. We must, therefore, if possible, convince the Portuguese by facts, arguments, and the Law of Nations, that the exact opposite is the truth.

The Portuguese people are proud, and, may be, stiff-necked; but they have done splendid services to humanity by their former industry, bravery, and discoveries. As ancient allies of England for five centuries, they should

be treated in the future, as in the past, with friendship and generosity. We have acted as we have done lately in the exercise of what we considered our undoubted rights, and in no spirit of aggression or vindictiveness against Portugal, or her subjects, or colonial possessions. We set up no ancient claims of right to the disputed territory. We know perfectly well that no later than a very few months ago the Scotch Missionaries at Blantyre had no expectation that the country in which they laboured would, in fact, be declared under the protection of the British Government, and that the utmost they then expected was that they should not be driven out of their settlements in the Shiré and Nyassa districts. The date of the Declaration of the British Protectorate, in which Mandala, Mudi, and Blantyre are situated, was 21st August, 1889. Suppose a Portuguese Protectorate had been declared before that date, scarcely six months ago, where would we have stood, and what would our position have been in the eyes of foreign nations?

The situation on the River Shiré is a difficult one, and so it is on the Zambesi, with Quilimane at its mouth ; and the practical question which now arises is as to the steps to be taken to establish our protectorate and authority on the Zambesi, and make them realities. As yet, the only great civilising Power in Central Africa is Britain. Even Major Serpa Pinto acknowledged in his *Travels* across Africa, about twelve years ago, that Portugal had no government at all in Central Africa, and no power there, except for evil. He cannot say that Portuguese government or influence has become greater or better since then. I must refer the reader to his interesting and instructing book for the Major's views of his mission, of his discoveries, and for his opinions as to the prospects of extending Portuguese trade and influence in Central Africa from the East Coast, and not, as then existed, from the West. I am apt to think that the Portuguese surveying expedition of 1877 was the direct parent of the

Portuguese surveying expedition of 1889. The Major holds that lawful trade in the interior of Africa is the surest messenger of progress and civilisation in the land of the negroes. He also holds that Portugal was justified by facts and law in her mission of African civilisation. How far this latter opinion is correct need not be here discussed further than has already been done in this Article. I merely refer to these opinions now as indicative of the views held by the Major himself, and probably by the majority of his countrymen. To extend European civilisation, with the aid of the friendship and goodwill of Portugal, our most extensive neighbour in South Eastern Africa, and our ancient ally in many a European fight, would be worth some considerable sacrifice on the part of the British nation. No wonder, therefore, that Lord Salisbury acted, as long as possible, with the utmost delicacy and consideration towards Portuguese aspirations and susceptibilities.

Unless our claims on the north and the south of the Zambesi should now be fully recognised by Portugal in a clear and explicit form, we may hereafter be taunted with indefiniteness and obscurity in our pretensions and policy. Let the reader observe that our demands upon the Portuguese were not a recognition of sovereign or protectorate rights, but merely a demand for the withdrawal of the Portuguese expedition, whether surveying or military. We must, therefore, firmly insist on the necessity for the absolute abandonment by the Portuguese to any claim of sovereignty, dominion, or jurisdiction over the territory comprehended within the terms of the Royal Decree of 7th November, 1889, or in which Major Serpa Pinto and his forces set up, or attempted to set up, the Portuguese flag. At all events, we ought not to depart a single iota from our position that the territory lately declared under our Protectorate in South Eastern Africa is and shall remain so in the most absolute sense, and without any qualification whatever,

unless such as we are pleased to impose on ourselves, or to which we voluntarily and freely agree. Beyond the limits of this declaration, there can be no objection to the most friendly and satisfactory negotiations with the Portuguese. All we wished was a clear and unmistakable acknowledgment by the Portuguese of our rights on the Shiré and Zambesi. We already know officially what were the views of Senhor Barros Gomes. We are in no greater doubt as to the opinions of his successor, Senhor Serpa Pimentel, the present Prime Minister; for he lately said that Britain had might, but that Portugal had right on her side. As, however, the policy of the Portuguese Prime Minister has always been never to take a step in African policy without getting the sanction of the British Government, we may not unreasonably hope that the Anglo-Portuguese dispute in South Eastern Africa is nearer an end than outward and popular manifestations in Portugal would naturally suggest.

I attribute no permanent or vital importance to the ebullition of temper lately displayed by the Portuguese Nation against us. No doubt, immediately following on the submission of the Portuguese Government on 12th January, 1890, to the British demands, the Portuguese at Lisbon assembled in disorderly crowds, and cried out for the downfall of the Barros Gomes Ministry. The excited crowd then assembled outside the British Consulate. In spite of the police, they broke the windows, and tore down the British escutcheon on the front of the building, the windows of several of the Portuguese Ministers being broken, and the British Legation requiring to be protected by the police. Afterwards the people quietly dispersed. On the following day, the Portuguese Prime Minister tendered an explanation of what had happened, and regretted the insults offered and injuries done to the British Consulate, and Senhor Barros Gomes informed Mr. Petre that the

escutcheon should be restored, and the damage repaired. Thus this regrettable affair came to an end. The other demonstrations against British trade and citizens are too unimportant and insignificant to deserve more than a passing notice.

• In the present century there has been a great and sublime invasion of Africa by the most civilised, powerful and energetic peoples of Europe, by the British, French, German, and Italian peoples, for the promotion of industry and commerce, education and religion, freedom and civilisation, liberty and settlements. In carrying out this policy no country has been more active or successful than our own ; and Belgium and Germany have merely followed us at a considerable distance. Still, we must not be niggardly in our praise of King Leopold II. of Belgium for his munificent promotion of geographical discovery and commercial activity in the patronage he has bestowed on the International African Association, established in Africa in 1881, for trade and commerce, and the establishment of European factories on the River Congo, and to the International Conference held at Berlin in 1884-5, when the International African Association was officially recognised by all the Great Powers of Europe, and started on, as I believe, a high and beneficent career in the civilisation of the territory in the Congo basin. This Association has an immense territory under its control. Its main objects are, within its dominions, to exercise sovereign authority and jurisdiction ; to promote trade and commerce on the principles of commercial freedom ; to open up roads and construct railways ; to extirpate slavery and the hateful trading in slaves, and all the cruelties and atrocities therewith connected ; and, lastly, to protect the natives against injustice and oppression.

While, in justice, confessing that the Portuguese discovered Southern Africa more than four hundred years

ago ; that they began the civilisation of the Dark Continent by their Traders, Missionaries, and Travellers, who had explored large portions of the west and east coasts, and also of the interior, I am compelled to affirm that as yet the Portuguese have never established any firm or civilised government in any part of their African dominions ; that their government in Africa has been corrupt and demoralising ; and that their practice of banishing their criminals to Benguela for life has fearfully demoralised and deteriorated the natives, and also the African Portuguese government, civil and military. I am not ignorant that, in 1842, the Portuguese Government entered into a Treaty with the British Government for the extirpation of Slavery on the west and east coasts of Africa. But I venture to assert that, for 10 years, if not much more, after that Treaty was ratified, and ostensibly put in execution by the Portuguese, the Colonial officials of Portugal enriched themselves by giving protection to the horrible and detestable traffic in human beings ; and that the Home Authorities at Lisbon could not, or would not, prevent their subordinates from setting the law at defiance. In support of this statement, I would refer to Major Serpa Pinto's *Travels* across Africa in 1877-8, and to the numerous despatches by Lord Palmerston to the Portuguese authorities which are to be found in the Blue Books on African slavery. With regard to the Portuguese objections to Free Trade in Africa, I have to refer to our negotiations connected with the Mozambique Tariff of 1877, and as to the abortive Treaties of 1878-9 and 1884 as to the Congo ; and to the unimpeachable testimony of the numerous African travellers, traders, and missionaries, and even of the Portuguese themselves, as to the constantly diminishing Portuguese trade on the African continent. If Africa is ever to be civilised, it must be through freedom of trade and commerce, and by the spread of industry, education, morality, and religion amongst the natives. What has

Portugal done in these important matters for three centuries? Absolutely nothing. To accomplish the civilisation of Africa is beyond the strength of Portugal. This task must be undertaken by nations stronger, richer, and more experienced than she is, in colonising and civilising barbarous peoples. This being so, the acquired and indisputable rights of other European nations being fully recognised, what other country in the world is so capable of colonising and civilising the regions of Central Africa as our own? None. We have the experience of at least a couple of centuries in dealing with barbarous races. We have the wealth, the courage, and the wish to enter on so grand and sublime a task. Nay, more, we have never kept the fruits of our labours and sacrifices exclusively to ourselves. But we are ready and willing to open up, and maintain open, those regions to the courage and enterprise and the commerce of the whole world.

I have already referred to the labours of British travellers in exploring the dark and unknown regions of Africa. Let me now refer to the efforts of the British Trading Companies to open up Africa to the advantages of an enlightened commerce.

The African Lakes Company, Limited, was created in 1877 by a number of Glasgow merchants, and is still largely controlled by the citizens of Glasgow and the neighbourhood. Its exertions have largely developed the industrial capacities of Africa, and of its inhabitants on Lake Nyassa and the vicinity. It has also extended its own civilising influences to a very considerable territory in Central Africa. If the claims lately set up by the Portuguese had been conceded by the British Government, the existence of this Company would have been imperilled, and probably terminated; for the Town of Quilimane, at the mouth of the Zambesi, already belongs to and is occupied by the Portuguese, and, under the Mozambique Tariff of

1877 exacts import duties on Inland transit, and also import and export duties in the ordinary sense of these terms ; and, if Portugal were established at Lake Nyassa, on which her subjects had fixed their eyes for some time past, this Company would have succumbed to the enervating and anarchical government of Portugal in Africa. Secondly, the British South African Company was, last year, established by a Royal Charter, with practically sovereign rights ; and, under the guidance of an enlightened commercial spirit, and of a wise philanthropy, will no doubt do an immense deal of good in Matabeleland and Mashonaland. These two commercial companies, acting in harmony, and with a due regard to their commercial and humanitarian interests, and to the development of industry, education and Christianity will rapidly and enormously help to confer, on the territory committed to their charge, the blessings of peace, prosperity, and civilisation. Moreover, the various private trading companies and traders will, doubtless, aid and support them in their beneficent labours. Roads will be made, and railways constructed ; steamers will sail up and down the navigable parts of the Zambesi and the Shiré, and around the Lakes Nyassa and Tanganyika, Victoria Nyanza, Albert Nyanza, Albert Edward Nyanza ; and the slave-trade in the interior of Central Africa will give way to the legitimate trader engaged in supplying the natural wants of men ; the ignorant and superstitious Medicine man will give way to the cultivated medical and surgical practitioner ; the sorcerer will be driven from his falsehood and deception by the missionaries of the Gospel ; and peace and plenty will abound in the regions where war and famine have reigned supreme for more than a thousand years.

With such glorious prospects in view, can any friend of the human race, or even of the poor, ignorant, and superstitious Negro in Africa, do otherwise than wish prosperity to our country in carrying forward the grave

task, yet glorious mission, upon which we, long ago, entered in Africa ; in which we have made large and heavy sacrifices in men and money ; and in reference to which, and to Africa generally, the Anti-Slavery Conference at Brussels has entered upon its humanitarian labours for the abolition of African slavery by sea and land, and for the improvement of the condition of the Native African tribes, and for the restriction in the importation of guns and warlike weapons and ammunition, and of the still greater curse to the native Africans, the sale of intoxicating liquors amongst them. Let us see what Maliki, Emir of one of the Niger countries, says on this latter subject : "What I have to say," he said, "is not a long matter. It is about Rum, Rum, Rum, It has ruined my country. It has ruined my people. It has made my people become mad." Very true as well as very pathetic. Further, we must do all we can to extirpate Slavery out of Africa, and never become weary of the task ; for a practice such as slavery dies slowly, and will scarcely be extirpated, even under the most favourable circumstances, during the present or the next generation. Slavery can only be extirpated by the progress of civilisation and Christianity. It was not extirpated in Europe for several centuries after it was universally condemned by enlightened opinion and the principles of the Gospel.

VII. *Conclusion.*

While the foregoing Article was passing through the press, the Blue Book, *Africa* No. 2 (1890), containing the correspondence respecting the action of Portugal in Mashonaland, and in the districts of the Shiré and Lake Nyassa, was published. Although I wish that I could have seen and read the whole of that correspondence before writing the present Article as fully and carefully as I have done since, I find that I have no material alterations to make on _{or} revisal. The perusal of that correspondence

shews me conclusively that the British Foreign Secretary, Lord Salisbury, was neither precipitate, nor unjust, nor inconsiderate, in issuing his Ultimatum of the 10th of January last. For two years he had been earnestly endeavouring to arrive at an amicable settlement with the Portuguese Foreign Minister, Senhor Barros Gomes, and had failed so to do. The Portuguese Nation and Government, and their Colonial officials had, by Diplomacy and energetic action, been striving to get an unfair advantage over us in Africa, and the time for our decision and action had arrived. Having gone so far and won, I sincerely hope that Lord Salisbury will now make a final and satisfactory arrangement between Great Britain and Portugal on the basis of the free navigation of the Rivers Zambesi and Shiré. By effecting such a settlement, he would confer an immense blessing on the Dark Continent, and greatly advance commerce, education, civilisation, and Christianity throughout the whole of Africa. I shall, therefore, now conclude in the words with which I had originally closed my survey of this important question.

Africa, with its rich pastures and arable land; its rich mines of diamond and gold; and its teeming multitudes of men and women, has a grand future before it. Let Europe see to this grand future being guided and promoted by the most capable nations in the world for the work to be accomplished, and not delayed or postponed by senseless strifes and rivalries, or by leaving or entrusting to the least capable the high duty which requires to be performed in Africa by Europe.

ALEXANDER ROBERTSON.

IV.—CURRENT NOTES ON INTERNATIONAL LAW.

The Provisional Government in Brazil and the Question of Recognition.

The *coup d'état* by which Marshal da Fonseca shipped off to Europe the Emperor and Imperial family of Brazil, and initiated a "Federal Republic" in lieu of the Monarchy, was effected so quietly, and, at all events at first, with such seeming acquiescence on the part of all parties concerned, that one almost hesitates to apply to it so apparently severe a term as Revolution.

A Revolution, however, it was, as well as a change of Government, and, as such, cannot fail to be of interest to the student of International Law. It is not our purpose here to deal with the Political or Ethical aspects of the question; they may be left, for the present at least, to the politician and moralist. We have merely simply to examine the incident in its bearing on the Law of Nations.

As yet, unfortunately, our information is very scanty. The anti-Republican revolt of 18th December, 1889, appears to have had the effect of inducing Marshal da Fonseca and his coadjutors to impose severe restrictions on the Press and the Post Office, so as to prevent the communication of details such as the rest of the world would have been glad to have had concerning the change and its results.*

[* At the actual moment of the original Revolution, interesting notices of the events of the twenty-four hours which sufficed to bring it about, were contributed to the *Belgian News*, by a correspondent in Brazil, who came to the conclusion that it must have been long in preparation, which seems very probable. But it is another question how far the change of Constitution is really desired by the people as a whole.—Ed.]

One point, however, is clear, and that is that the Revolution has so far been effectual, and that a Federal Republic has been substituted for the Empire. By the manifesto of the revolutionists published on the 15th November, 1889, in the shape of eleven articles, under the title of a "Decree of the Provisional Government," it was formally declared, amongst other things:—

1. "That a Federal Republic is provisionally proclaimed.
2. "That the United Provinces of Brazil form a Confederation.
4. "That until the election of new legislators the country be governed by a Provisional Government.
11. "That the Secretaries of State of the present Provisional Government be charged with the execution of this Decree."

It would thus appear that the new Constitution is to be, at some future time, based on that of the United States of America, but is only to come into operation as and when the Provisional Government deems it expedient. The latter contingency does not yet seem to have come to pass.

The question which is most relevant to our present purpose, therefore, is as to the Recognition of the new Government by other States.

The usual rule is that on the outbreak of a rebellion or insurrection, it is the *prima facie* duty of Foreign States to regard the *status quo* as unaltered until such time as the new Government has completely vindicated its authority, and been acquiesced in by the bulk of the population. According to a distinguished modern writer, "recognition is not permissible until the contest is won." (*Letters by "Historicus,"* p. 19.) Even the United States, always ready (sometimes, as in the unfortunate case of Hungary in 1849, too ready*) to

[*] There was, no doubt, a certain natural goodwill towards the possible Republic of Hungary, on the part of the U.S.A., but mere expressions of a willingness to have recognised an independent Government, if such had been

recognise the birth of a new Republic, have laid down the principle in a long series of instances that "To sustain the recognition of the United States. . . . it is enough if it [the new Government] be obeyed by a large majority of the country and is likely to continue."*

It will be remembered, in passing, that the U.S. Government was the first to recognise and lend Diplomatic support to the "National Defence Committee" of France in 1870. In the case of Brazil, so far, there appears to have been no active recognition of the new state of affairs on the part of the United States or of any European Government. The general *consensus* of opinion seems to be in favour of abstaining from formally recognising the change of Government, at least until it has been ratified by the Cortes of the nation.

It is as yet uncertain what steps, if any, have been taken by our own Foreign Office in the matter, but the question has been discussed to some extent in both France and the United States. In the former country, M. Spüller said in the French Chamber: "I think it is necessary to wait until the Provisional Government has transferred its provisional powers to the National Assembly before recognising it officially."† In the Senate of the United States, Senator Morgan, of Alabama, introduced a Resolution expressly recognising the new Government of Brazil. It was, however, after some debate, conveniently shelved by being referred to the Foreign Committee of the House, "pending the receipt of definite news."‡ According to a letter, how-

established as the result of a successful revolt, do not constitute Recognition, and President Taylor does not seem to have gone further than that point, by his own words, in his special message, Mar. 28, 1850, cited by Wharton, *Digest of Int. Law of U.S.A.*, I., p. 537.—ED.]

* Mr. Cass, Secretary of State, to Mr. McLane, 1859, as to the Mexican Revolution. Wharton, *Digest*, I. 539, and *passim*, § 70.

† *Times*, 28th December, 1889.

‡ *Times*, 21st December, 1889.

ever, from the Brazilian representative in England to the London papers, dated 31 Jan., 1890, the U.S. Government has since made formal recognition, and has accepted the credentials of the Brazilian Minister at Washington.* Apart from this, intelligence is wanting, although a statement was made early in December last, in a Brazilian newspaper, that owing to the express refusal of the Russian Government to recognise the Provisional Government, the latter had threatened the breaking off of Diplomatic relations with the Russian Empire. This, in all probability, was a mere *canard*,† but it has since been stated on good authority that the Czar has declared that he will never recognise the Brazilian Republic during the lifetime of Dom Pedro. ‡

The only other point of interest in Brazilian affairs in connection with International Law is the Decree of the Provisional Government § making all strangers who have lived in the country two years or more Brazilian subjects, unless they specifically refuse the new nationality. Such a decree must prove particularly irksome to persons resident in Brazil who are subjects of States where military service is compulsory and evasion of it a penal offence.

It seems certain that the European States chiefly interested in the matter have made representations to the Provisional Government deprecating the new Decree, and it was recently rumoured that the latter had been the subject of an urgent Collective Note on the part of Portugal, Germany, and Italy.

J. M. GOVER.

* *Times, etc.*, 1st February, 1890.

† *Times*, 6th December, 1889.

‡ *Times*, 5th February, 1890.

§ *Times*, 18th December, 1889.

Quarterly Notes.

County Councils and County Counsel.

The various bodies of administrative legislators created under this semi-antique title are more or less settling into their work, and more or less beginning to distinguish themselves, whether by the admission of women, in the teeth of the recent decision in *Hope v. Sandhurst* (L.R. 23 Q.B.D. 78), or by orders relating to the apprehension and slaughter of stray dogs, which have at once raised the ire alike of the philanthropist and of the owners of valuable dogs, who object to having them killed with practically no chance of redemption. The former point is a more serious one for the London County Council than the mass of its members, including, perhaps, the ladies themselves, are at all likely to be aware, though the Earl of Rosebery, in the very qualified welcome which he gave them, seems to have had a fairly keen apprehension of possible trouble to come. If that trouble should come, as it not impossibly might, on the question being raised, in the shape of a Judicial declaration of the invalidity of acts done by the Council, in which two (*ex hypothesi*) illegally sitting members took part, this would inevitably be a considerable source of difficulty, not only to the noble chairman, but also to the body over which he ably presides, and to the public in so far as purporting to be affected by any orders made under such circumstances. It only needs that some one with the spirit of Mr. Dobbs, of Waterworks fame, should arise to challenge the validity of orders made since the ladies took their seats, for a scene of beautiful confusion to be presented to our view reflecting the highest credit upon our

capacity for extending the power of local self government, and of using it when extended. The January number of the *Quarterly Review*, under the apposite title of *County Counsel*, gave the County Councils much good advice. It was too early in the field to touch upon the point raised by the action of the ladies who were returned as members on the London Council, but it touched upon another, involving a somewhat interesting historical question. The *Quarterly* reviewer urged the desirableness of strengthening what we imagine he would consider to be the Conservative side of these so-called Democratic bodies by the infusion of a goodly amount of the Freeholder element. The curious thing is that the *Quarterly* does not seem to understand what a change has passed and is still passing over that doubtless historical person, the Freeholder. He is, we conceive, the legitimate representative of the Allodial land-holder, who survived the almost all-engulfing tide of Feudalism, and emerged into new life on the abolition of the Feudal military tenures at the Restoration. But he is, nowadays, a person of such small note that Electoral Registration Associations, though they are, unfortunately to our thinking, purely partisan bodies, and though the Middlesex and Yorkshire Registries at least would help them, do not trouble themselves to seek him out, and place him on the Electoral Register for his Division of the County in which his property qualifies him. He is rarely to be found on Vestries, and when ther., we believe it would generally be found that it was not his Freehold, but some totally different local *causa causans* to which he was indebted for his position. He may enjoy an extra vote for the Guardians of the Poor of his Parish, if he happens to reside on his Freehold, and to know that under the circumstances that he can claim it, but even then there is nothing distinctive in an extra vote shared with persons who may have but brief interests in terms of years as Leaseholders.

All this seems rather unfair to the poor old survival of *Al-od*, after holding his own for so many centuries against the powerful forces which, His Most Sacred Majesty of Tillietudlem notwithstanding, are still ranged in English Law under the obsolete banner of *Fe-od*.

Quarter Sessions and the Treatment of Untried Prisoners.

Lord Gwydyr, we learn from the *Thetford Times*, moved a Resolution at a recent meeting of the Justices for Suffolk, to which we would draw attention, however briefly, as it raises some grave points, both as to the unnecessary awkwardness to Justices, Counsel and Solicitors, Jurors, Prison Officials, and Prisoners alike, involved in some of the existing arrangements for the holding of Quarter Sessions, and as to the treatment of the unconvicted. Although the learned Chairman of the Sessions appeared to see only the difficulty of procuring a Legislative remedy for a grievance of which he did not deny the existence, the noble Lord persevered, and it would seem that he deserves the thanks of more than Suffolk men for having so persevered. The discomforts attending the existing arrangements, involving, it is alleged, unnecessary journeys of some forty or fifty miles to all concerned, are intensified in the case of the untried Prisoners, who after what cannot but seem to them a long detention, on food of which they say that it leaves a constant craving for more, are, under what authority it is not stated, brought up for trial on a chain-gang. This treatment of presumed innocent persons, and who, in the case specially referred to by Lord Gwydyr, were actually so found on trial, might well suggest in our minds some doubt as to whether we are, after all, the really Free Nation and the virtuously Humane People that we are so apt to proclaim ourselves. A chain-gang of presumed innocent persons going to stand

their trial is a sight which ought at least to give us food for reflection. If the result should be an amended Legislation on the points taken up by the Suffolk Justices, we shall have much reason to be grateful to Lord Gwydyr and his brother Justices.

Reviews.

An Exposition of the Principles of Partnership. By JAMES PARSONS, A.M., of the Philadelphia Bar, Professor in the Department of Law and of Philosophy in the University of Pennsylvania. Boston. Little, Brown & Co. 1889.

Notwithstanding the depreciatory remarks made in a recent case by an eminent English Judge as to the value of American decisions for purposes of citation, we venture to think that both our Judges and our text-book writers might find a great deal to learn from their Professional brethren across the Atlantic.

The work on Partnership now before us is an admirable specimen of the best kind of American Legal literature. The type and general appearance of the volume are in every way commendable, and although the German text in which the head-notes are printed may be irksome to the English reader, this may perhaps be attributable rather to unfamiliarity than to intrinsic unsuitableness.

Mr. Parsons's work, although in a certain sense elaborate and exhaustive, is considerably smaller than Lord Justice Lindley's standard Treatise, while yet not occupying the position of a concise epitome of the subject such as is afforded by Sir Frederick Pollock's well-known book. Of course, it is not to be supposed that Mr. Parsons's book can in any way supersede or even rival in our own country either of those English text-books. Its real value, we think, lies in its remarkably able summary and comparison of the various principles of the Law of Partnership, not only as established in the author's own country and in England, but also in various European countries, together with very useful references to Roman Law and the

later Civil Law. In fact, Mr. Parsons (who, we may, in passing, appositely mention, occupies a chair both of Law and of Philosophy) has given us an exceedingly lucid and detailed instance of the application of the Comparative method to the study of a specific branch of Law. Although this may not enhance the value of the book to the average English lawyer, it certainly comes as a refreshing change to those of us who endeavour to vary the monotony of the sometimes wearisome study of practical Law, with an occasional deviation into the wider fields of Thought which have been opened to us by Bentham, Austin, Maine, and other modern Jurists.

So much for Mr. Parsons's method. To descend to the details of his matter, we can only say that these appear to have been the subject of as careful attention as could be wished for in a book of this kind.

The author treats of his subject in much the same manner and order of topics as does Lord Justice Lindley. The Case Law appears to be well brought down to date, and it is noticeable that Mr. Parsons does not apparently reciprocate the contempt for foreign decisions which is sometimes affected by English writers. Such recent Judgments of our Courts as those in *Badeley v. Consolidated Bank*, 38 Ch. D.; *Cambefort v. Chapman*, 19 Q.B.D. 229; and *Pilley v. Robinson*, 20 Q.B.D. 155, being referred to in some detail.

In conclusion, we would congratulate Mr. Parsons on two things: Firstly, on his admirable Index of Cases, and secondly, on the remarkable variety of the authors from whom he quotes in a manner quite like that of Grotius, ranging as they do from Jonathan Swift to Sir Henry Maine, and from Justinian and Bracton to Rousseau and John Stuart Mill.

The Small Debt Amendment (Scotland) Act, 1889, with Notes and Forms. By J. M. LEES, M.A., LL.D., Advocate, Sheriff-Substitute of Lanarkshire. Glasgow. William Hodge and Co., 1889.

The name of Sheriff Lees is not unknown to the readers of this *Review*. When noticing in our number for May, 1889, the suggestions for the *Codification of Sheriff Court Law*, by Mr. George Young, we referred to the Sheriff's valuable contribution on that branch of the Law, published in the *Law Magazine and*

Review, No. CCXLI., for August, 1881. The present small volume of some 50 pages comprises the new Act above-mentioned with notes in illustration of the text. And, recognising the reputation of the Editor in regard to his earlier publication, the *Small Debt Handbook*, it is unnecessary to say that this little work will deserve all the success it is sure to command. Sheriff Lees eulogises the Consolidation Small Debt Act of 1837, but admits that with changing times and lapse of years there may be good reason for an amending statute in 1889. Of this there is, indeed, sufficient evidence in a few lines in the Preface, where the more important changes are summarised. Of another work of the Sheriff it was said that on nearly every page hints and suggestions might be found, indicating actual observation and experience, and something to the same effect may be alleged of this his latest work. The various sections are annotated with the closest attention, and some have to every line, one or more paragraphs of value adhibited. Whether as giving a fuller meaning to a term used, or supplying additional information, or guarding against a possible misconception, the notes are always clear and to the point. The Act so edited cannot be otherwise than a convenient and useful supplement to the *Small Debt Handbook* by the same learned author.

[*** Pressure on our space compels us to postpone Dr. Raikes's *Foreign Maritime Laws*, and other matter in type.]



THE

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I.—THE *CY PRÈS* DOCTRINE.

THE *Cy près* doctrine may be defined to be that of giving effect as nearly as the Law will allow, to the primary intention of the donor or settlor, when the particular mode of carrying out such intention pointed out by the donor or settlor is impracticable, either by failure of the objects, or by being contrary to the policy of the Law, or for any reason other than that of being actually prohibited by law. Its application in the English Courts has been limited to two classes of cases; viz., (1) to the construction of charitable gifts and modification of charitable endowments: (2) to giving an effect to certain contingent remainders which would otherwise infringe the law of perpetuities. It is with the former of these two classes that we are concerned here. In this relation it presents a curious illustration of the favour shewn in our Jurisprudence to charitable gifts. Throughout the history and development of this branch of our Law, we find two opposing, or apparently opposing, currents of principle. The one, that upon which the Statute law of Mortmain has been based, viz., of restricting charitable gifts so far as they affected land within narrow and defined limits; the other, of carrying into effect, so far as the Law will allow, the charitable intention of the donor. The one principle was mainly political, partly dictated by the necessities of Feudalism, and partly by the desire to prevent lands from becoming inalienable: the other was based partly on the

Equitable principle of *sb* construing a gift *ut magis valeat quam pereat*, and partly from the favour with which the Civil Law and all systems of Jurisprudence derived from it have at all times regarded charities. As it is put in Domat,* “since legacies for works of piety and charity have a double favour, both that of their motive for holy and pious uses, and that of their utility for the public good, they are considered a thing privileged in the intention of the law.”

Originally, moreover, the jurisdiction over wills of personal property was in the hands of the Ordinaries, whose decisions were mainly inspired by the Civil or Canon Law; and when such jurisdiction was transferred to the Chancery Courts the same principles were recognised as governing the construction of wills. Lord Eldon, in the celebrated case of *Moggridge v. Thackwell*, 7 Ves. 69, suggested that the favour shewn by the Courts of this country to charities may have arisen from the religious notions entertained formerly, “as there was a period in this country, when a portion of the residue of every man’s estate was applied to charity; and the Ordinary thought himself obliged so to apply it on the ground that there was a general principle of piety in the testator.” And Wilmot, L.J., in *A.-G. v. Downing* (Wilmot, Op. and Jud., p. 52), said “Charity was an expiation of sin and to be rewarded in another state, and, therefore, if political reasons negatived the particular charity given (*sic*), the Court thought the merits of the charity ought not to be lost to the testator or to the public, and that they were carrying out his general pious intention, and proceeded upon a presumption that the principle which produced one charity would have been equally active in producing another, in case the

* *Esprit des Lois*, Strahan’s Translation, 1738, Liv. iv., Tit. 2, s. 6 (vii.), and cf. *Ibid.* (iv., v., vi.), where the author gives several illustrations and examples derived from the Canon Law.

testator had been told the particular charity he meditated could not take place. "The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious would entitle him to the same reward." The *Cy près* doctrine was no doubt the logical carrying out of this principle, and hence it came to be recognised in the English Courts.

It has been said that it dates back its origin to the time of the Roman Emperors, but the only trace of it in the Code of Justinian is to be found in the *Digest*, Lib. xxxiii., Tit. 2, as one of the *responsa* of Modestinus.

"*Legatum civitati relictum est ut ex redditibus quotannis in eā civitate, memoriæ conservandæ defuncti gratiâ, spectaculum celebretur quod illuc celebrari non licet. Quero quid de legato existimes?* Modestinus respondit: *cum testator spectaculum eidi voluerit in civitate, sed tale quod ibi celebrari non licet; iniquum esse, hanc quantitatem quam in spectaculum defunctus destinaverit, lucro heredum cedere. Igitur adhibitis heredibus et primoribus civitatis, inspiciendum est in quam rem converti debeat fideicommissum ut memoria testatoris alio et licito genere celebretur.*" *

In this passage, written nearly a century before Christianity became the religion of the Empire, there seems but a very faint glimmering of the doctrine, and it can scarcely be supposed that the acknowledged favour shewn by the Civil or Canon Law to charitable bequests can be referable to any such doubtful authority. The leading principle upon which that favour was based was the duty of the Christian state to encourage acts of benevolence, of which no trace is to be found in the above passage; and it is much more reasonable to suppose that the changed estimation with which the world regarded charitable gifts led to the introduction of the doctrine, than that it was a

* To a similar effect is a *responsum* of Scævola, which follows in the *Digest* that of Modestinus.

conscious extension of 'the principle embodied in the *Digest*. However this may be, there is no trace of the doctrine being put into practice in England before the Reformation, although in the earliest reported cases where it has been applied, it is treated as a well recognised rule, and as one owing its origin to the traditional favour with which charities had always been regarded.

Much of the obscurity which covers the introduction of the doctrine into our Law may perhaps be explained by the fact that, in the earliest times, purely charitable gifts, as they would now be understood, were almost unknown. The piety of donors was most generally displayed in gifts to religious houses, and the application of the subject matter of such gifts was exclusively in the Superiors of the different Orders, and entirely exempt from secular control. From the religious houses the administration of charitable gifts passed to the Chancellor, as keeper of the King's conscience, the latter having as *parens patriæ* the general superintendence of all infants, idiots, lunatics, and charities. And it was not until some time later that this jurisdiction became gradually merged, and then only in cases where trusts were interposed, in the general jurisdiction of the Chancery Courts. It is not necessary to go into the long vexed question as to when that actually took place. It is enough to say that it is now pretty conclusively established that the jurisdiction of the Chancery Courts over charitable trusts existed anterior to, and independently of, the Statute of Charitable Uses, 43 Eliz., c. 4. As charitable gifts generally involved the existence of a trust reposed in some one, it was natural that the Chancery Court, which assumed jurisdiction over trusts, should have gradually extended that jurisdiction over charities generally; but the origin of the power, that it was one delegated by the Crown to the Chancellor, must not be lost sight of, as in this way, probably, can be best explained the curious

distinct jurisdictions vested in the Crown and the Chancery Courts respectively to apply gifts *Cy près*, the limits of which, though long uncertain, were finally determined by Lord Eldon in the celebrated case of *Moggridge v. Thackwell*, 7 Ves. 69. If we remember that the original jurisdiction in all charitable matters was in the Crown, and that even after the Chancery Courts acquired a jurisdiction over trusts, there was still a class of cases untouched by such jurisdiction, we shall better understand how the prerogative of the Crown still remained in a certain class of cases, as we shall see hereafter.

However this may be, there is no doubt that when the Chancery Courts obtained the jurisdiction over charities, which they have never lost, the liberal principles of the Civil or Canon Law as to the carrying out of such gifts were the sources and inspirations of their decisions. And hence the *Cy près* doctrine became gradually well recognised, though the mode of its application has varied from time to time. Perhaps the most striking instances of this liberal construction are to be found in the series of cases which, by a very strained interpretation of the Statute of Elizabeth with regard to charitable uses, decided that gifts to such uses in favour of corporations, which could not take by devise under the old Wills Act, 32 Hen. VIII., c. 1, were good as operating in the nature of an appointment of the trust in equity, and that the intendment of the statute being in favour of charitable gifts, all deficiencies of assurance were to be supplied by the Courts.

Although, historically, there may be no connection between the power of the King over the administration of charities, and the dispensing power reserved to him by the earlier Mortmain Acts, the one being, as we have seen, a right of Prerogative, the other a Feudal right in his capacity as ultimate Lord of the fee, it is perhaps not wholly out of place to allude shortly to the latter, particularly as the two

appear not to have been kept distinct in later times. By the earlier Mortmain Acts, the dispensing power of the King, as Lord Paramount, to waive forfeitures under these Acts was recognised, and gifts of land to religious or charitable corporations were made not *ipso facto* void, but only voidable at the instance of the immediate Lord, or, on his default, of the King; and after the statute *Quia emptores*, which practically abolished mesne seignories, the Royal license became in most cases sufficient to secure the validity of the gift. The power of suspending statutes being declared illegal at the Revolution, it was deemed prudent, seeing that the grant of licenses in Mortmain imported an exercise of such suspending power, to give these licenses a Parliamentary sanction; and accordingly, by 7 and 8 William III., c. 37, it was declared that the King might grant licenses to aliens in Mortmain, and also to purchase, acquire, and hold lands in Mortmain in perpetuity without pain of forfeiture. The right of the mesne lord was thus passed over, and the dispensing power of the Crown, from being originally a Feudal right, became converted practically into one of Prerogative.*

The celebrated Statute of 1 Edward VI., c. 14, against superstitious uses, which is perhaps the earliest statutory recognition of the *Cy près* doctrine, points also strongly to the original jurisdiction in these matters being in the King.

* The power of forfeiture in the Crown, though in theory it remains, has practically become obsolete, unless the Mortmain and Charitable Uses Act, 1887, which professed to be merely a consolidating Act, has the effect of galvanising it into life again. That Act, which repeals all the old Statutes of Mortmain, makes land assured in Mortmain not liable only to forfeiture—as under the old Acts—at the hands of the mesne lord and ultimately of the King, but enacts that on every such assurance it shall become *ipso facto* forfeited to the Crown from the date of the assurance, subject to the successive rights of the mesne lord. It, however, preserves the right of the Crown to grant licenses. With regard to the provisions in favour of the mesne lord, it may be remarked that it is very doubtful whether there is now any land in England over which the rights incident to a mesne lordship—which must have been created before *Quia Emptores*—have been preserved.

The preamble, after reciting that great superstitions and errors arising out of vain opinions as to purgatory and masses were much supported by trentals and chantries, proceeded to state that the amendment thereof and converting the same to good and godly uses, as in creating of Grammar Schools, augmenting of the Universities, and better providing for the poor, could not in that Parliament conveniently be done nor ought to be committed to any other than the King, who would wisely and beneficially, both for the honour of God and the weal of the realm, order and dispose of the same. The statute, after declaring that property theretofore given to colleges, chapels, and chantries to uses deemed superstitious, e.g., masses and obits for the dead, should be forfeited to the King, provided that such property should be diverted and applied to other uses deemed to be pious and charitable, e.g., establishment of Grammar Schools, endowment of vicars and the sustentation of the poor. This Act only applied to certain specified superstitious uses then existing, and had no operation as to future gifts. The earlier Act of 23 Henry VIII., c. 10, which is, more properly, a Statute of Mortmain, made assurances of land to the use of such unincorporated fraternities and communities as were therin mentioned simply void, but did not forfeit them to the Crown.

The effect of the Statute of Edw. VI. was, as we have seen, to work a forfeiture; but there is, as was pointed out by Sir Wm. Grant in *Cary v. Abbot*, 7 Ves. 490, no statute making superstitious uses, such as masses for the dead, void generally. If they are void at all, they are void by the Common Law under the doctrine laid down in *Rex v. Portington*, 1 Salk. 162, that the King was bound by the Common Law to see that nothing be done "to the disherison of the Crown and the propagation of a false religion;" and it was so held after an elaborate review of all the authorities in *West v. Shuttleworth*, 2 My. & K. 684, and in *Heath v. Chapman*,

2 Dr., 417,* although the decisions in these latter cases differ from that in *Rex v. Portington*, where it was held that the King had the disposition of such gifts. Whether these latter cases were originally well decided or not, they have been so long unquestioned, in England at least, that there is no doubt that gifts for so-called superstitious purposes, where no purpose of charity is indicated, but only the benefit of the donor contemplated, would still be held void. But where there is a charitable purpose to be found in the gift, there, although the particular object is against the policy of the Law, the doctrine of *Cy près* comes in and the gift will be applied to a legal purpose. According to Sir Wm. Grant in *Cary v. Abbot* (cited above), "Wherever a testator is disposed to be charitable in his own way and upon his own principles, we are not to content ourselves with disappointing his intention,

* It cannot be said that the reasoning of the M.R. (Sir C. Pepys) in *West v. Shuttleworth* is altogether satisfactory. He says that the Statute of Edw. VI. had been considered as establishing the illegality of certain gifts, and among others the giving legacies to priests to pray or offer masses for the souls of the dead; but the Act is introducing a new law, not declaring merely the Common Law, and moreover it does not establish their illegality so as to make such gifts void, but enacts that they shall be forfeited to the King and disposed of for proper charitable purposes under his sign manual. The cases there cited, moreover, from Duke, and the note to *Adams v. Lamart*, 4 Co., 104, were cases in which the gift was held forfeited to the Crown, though doubtless many of them were cases directly governed by the Act itself. There is no doubt that before the Reformation the saying of Masses would not have been superstitious, and that a bequest for such a purpose would have raised a pious use and been unimpeachable at law. By the Statute of Westminster 1st (31 Edw. III., Stat. I., cap. xi.), it was enacted that "in cases where a man died intestate, the Ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods, which deputies shall have an action to demand and recover as executors the debts due to the said intestate in the King's Court for to administer and dispend for the soul of the dead." "The celebration of Mass is one of the most solemn and important portions of the public worship of the Roman Catholic Church. It is offered as a sacrifice for all present and for all faithful Christians living and dead" (*per* evidence of the Bishop of Cork in *Perry v. Tuomey*, 21 L.R. Ir. (Ch.D.) 480). It is performed generally in public

if disapproved by us, but we are to make him charitable in our way and upon our principles. If once we find in him any charitable intention, that is supposed to be so liberal as to take in objects not only within his intention, but wholly adverse to it." This is perhaps scarcely an accurate statement of the law, as it now obtains, because the general intention of the testator has been, in modern times, at least, jealously adhered to in the settlement of schemes *Cy près*.

The question then arises whether the diversion of the gift to a legal object is to be left with the Crown or with the Court. At first, as we have seen, the inference is that the Crown alone had jurisdiction by virtue of its prerogative. In *De Costa v. De Pas*, Ambl. 228, where there was a gift for establishing a Jeshuba or assembly for reading the Jewish Law, the *Cy près* doctrine was held to be applicable, and the administration of the gift to belong to the

for the benefit of the whole congregation, and none the less because it is said for the benefit of particular persons. Since the Toleration Acts, there can be no illegality in such a service, and one would think that at least it could only be in cases where the saying of masses for the souls of the dead was to be private and not an act of public worship that a gift for such purposes could be held bad as a charitable gift, and that on the ground that it is not for a general public use, which the idea of charity involves. As to this, however, there are cases to shew that a gift for the instruction of certain specified individuals in religion is a good charitable gift (see *In re Michel's Trusts*, 28 Bea. 39, since the legalisation of the Jewish religion). It certainly appears a singular result that after the Toleration Acts, a gift for any purposes and acts of worship sanctioned by any religion legalised by such Acts should, merely because such purposes or acts may appear superstitious to members of the Established Church, be held to be void. This is the view which has been taken in numerous cases in Ireland, where the Courts have declined to follow *West v. Shuttleworth*, and have held gifts for the saying of masses for the souls of the dead to be good charitable gifts: *Read v. Hodgson*, 7 Ir. Rep. Eq. 17, *Commissioner of Charitable Donations v. Walsh*, *Ibid.*, p. 34 (n), *A.-G. v. Delancy*, 10 Ir. Rep. C.L. 104, *Perry v. Tuomey*, *supra*. In *Felan v. Russell*, 21 Ir. Rep. Eq. 701, a gift to A. for such pious purposes as should appear to him most conducive to the glory of God and the salvation of testator's soul was held good, and a schema was decreed, but A. having died before the report, it was decided that the disposition of the fund lay with the Crown.

Crown. The rule was there laid down by Lord Hardwicke that where there is a gift which is illegal by statute, it is absolutely void, and the gift fails for the benefit of the heir or next-of-kin; but where the gift is merely against the policy of the Law, e.g., to a superstitious use, there the gift should be applied according to the *Cy près* doctrine by the Crown. This definition is perhaps not strictly accurate, for, as we have seen, when a gift is to a superstitious use, which if illegal at all, is illegal by the Common Law and not by Statute, the gift is absolutely void. But it is accurate, if for the words "a superstitious use," we read "a forbidden religious purpose," involving something like a public charitable use as distinguished from a private or superstitious use which benefits or contemplates the benefit of the donor alone. In the latter case, the application of the gift does lie with the Crown, and in this sense both the cases of *Dc Costu v. Dc Pas* and *Cary v. Ibbot*, where the gift was for bringing up poor children in the Roman Catholic Faith, were well decided. Both these cases were before the Toleration Acts, and the result would be different and the trusts held good since the Acts, as *In re Michel's Trusts*, 28 Beav. 39.

But the right of the Crown has, in fact, now become limited to two unimportant classes of cases. The rule is now recognised that it is only where gifts are made for unauthorised religious purposes, or when the gift is to charity generally without specified objects or where there are no trustees to distribute the fund, or to select the objects, that the Crown administers by its sign manual. Since the Toleration Acts, there can be but few cases coming within the first rule. The case of *Sims v. Quinlan*, 16 Ir. Ch. Rep. 145, 17 *Ib.* 43, where the gift was for the education and maintenance of two priests of the Order of St. Dominic in Ireland, is one instance. There the bequest was held void, as the Roman Catholic Relief Acts have not taken away the prohibition of law against

Orders bound by monastic or religious vows, but it was decided that the bequest could be carried out *Cy près* by the Crown under its sign manual. The second rule is a well-established one since the decision of Lord Eldon in *Moggridge v. Thackwell*, and may be traced—from *A.-G. v. Matthews*, 2 Lev. 167,—where the decree of the Commissioners under the Statute of Elizabeth was quashed, because the charity was for the poor in general and, there being no trustees, it belonged to the Court to dispose of—down to *A.-G. v. Fletcher*, 5 L.J. N.S. Ch. 75, and *Kane v. Cosgrove*, Ir. Rep. 10, Eq. 211, where the form of the petition and letters missive under the sign manual are given. But of late years, the right either has become obsolete, and the Crown has waived its jurisdiction, or there seems to be no reported case in which it has been exercised.

Much exception has been taken somewhat fantastically in the American Courts to the application of the *Cy près* doctrine in cases where by reason of no trusts being interposed, or where the bequest was to an object contrary to the policy of the Law, the gift would in this country have been at the disposal of the Crown. Mr. Justice Gray, in *Jackson v. Phillips*, 14 All. 549, 576, says, “such a power has never been recognised in the American Courts. It certainly cannot be exercised by the Judiciary of a State whose constitution declares that the judicial department shall never exercise the legislative or executive power, or either of them, to the end it may be a Government of laws and not of men” (Declaration of Rights, Art. 30, and see *Baptists' Association v. Harle's Executors*, 4 Wheat. 1). It is true that it was an exercise of the prerogative power of the Crown, but not of the Crown *qua* head of the Executive or as an arbitrary act, but rather in its capacity as *parens patriæ*, which might well be delegated to the Judiciary, just as in England the guardianship of lunatics and infants has been delegated to the Courts.

We shall proceed to consider shortly, (1) in what cases the doctrine will be applied, (2) on what principles it will be applied, (3) what beneficial alterations might be made in the rules which govern its application. In so doing we shall attempt to classify the cases, without however referring to the authorities, which would be outside the scope of this enquiry.

In the following classes of cases, the doctrine will be held inapplicable and there will be a resulting trust, (1) where the gift is directly in contravention or necessarily involves the contravention of the statute law, such as the Mortmain Acts; (2) where the particular purpose fails and there is no general charitable intent; (3) where the amount of the gift is uncertain and there are no means of making it certain; (4) where the gift is in terms so vague or wide as to include objects not strictly charitable; (5) where the gift is to a superstitious use. In all other cases of general charitable intention, where (1) no object is named but the amount is certain; (2) where the mode in which the gift is directed to take effect fails or cannot be carried out; (3) where the gift is to objects to be named and no nomination is made either by the donor or the person appointed to make the nomination; (4) where the object cannot be found or has ceased to exist after the testator's death; (5) where the object may not have come but may hereafter come into existence (in which case the fund may be directed to be retained in Court and enquiries directed); (6) where it is uncertain which of two or more charitable objects the testator intended to benefit; (7) where the trustees appointed renounce the trust or refuse to accept the legacy;* or, (8) where the gift is for a forbidden

* Certain bequests, though apparently charitable, will be held void if limited to a particular purpose which is against the policy of the law though not actually forbidden by law. Thus in *Thrupp v. Collett*, 26 Beav. 126, a gift for purchasing the discharge of persons imprisoned for non-payment of fines under

religious purpose, or one against the policy of the law, but not actually made illegal by statute, the intention of the donor will be carried out *Cy près* either by means of a scheme, or by the Crown, as the case may be.

One of the most frequent cases for the application of the doctrine is to be found where there has been an increase beyond the contemplation of the donor in the income of the charitable fund. It is in that case a question of intention to be derived from the will whether the increase is to go to the particular charity or be applied *Cy près*, or whether the devisees or legatees who take subject to the charitable gift shall have the benefit of it. The rule was laid down in the *Thetford School Case*, 8 Co. Rep. 130 b., that if the disposition shews an intention to devote the whole property to the charity—e.g., if the charitable object specified at the date of the will exhausted the whole then income, the increase will be devoted to the particular charity named. Lord Eldon, in *A.-G. v. Mayor of Bristol*, 2 J. & W. 294, doubted the soundness of this principle and said that the doctrine of resulting trusts was then little understood, but being settled it ought not to be disturbed; and it may still be taken to be the rule. He also laid it down that in distributing the increase the Court has power to alter not only the proportion in which the objects of the charity would take under the original instrument, but also the objects themselves. One of the most instructive cases on this head is that of *A. G. v. Wax Chandlers' Co.*, L.R. 6 H.L. 1.

On the other hand, when the charitable gift is clearly limited and meant to be limited in amount, and there is

the game laws was held void, as encouraging acts contrary to the law. So in *Habershon v. Vardon*, 4 De G. & Sm., 467, a gift "towards the political restoration of the Jews to Jerusalem and their own land" was held void, as, if it meant anything, it was to create a revolution in a friendly country, viz., the Ottoman Empire.

no contrary intention shewn in the instrument, there is a resulting trust.

In some cases, of course, by reason of the property having much increased in value, and the objects named having become more or less obsolete, an entire reconstruction of the charity by means of a scheme is required. One of the most notable cases in this relation of late years is that of the Campden Charities, 18 Ch. D. 310, which we will presently discuss more at length. Whether the increased income is applied for the same or for different objects *Cy près*, a scheme is required, and it is in these cases that the intervention of the Charity Commissioners is most often invoked, though as they cannot, except in cases where the income is under £50 a year, take the initiative, it frequently requires considerable pressure on the trustees to obtain the requisite consents, and it becomes necessary in some cases to certify or to threaten to certify the Attorney-General to move the Court for a scheme. It appears that the threat is often sufficient in these cases to bring the trustees or governing body to reason.

The recent legislation with regard to Endowed Schools marks a further progress in the *Cy près* principle. Under these Acts, 32 & 33 Vict., c. 56; 36 & 37 Vict., c. 87; 37 & 38 Vict., c. 87, large powers have been given to the Charity Commissioners to adapt the older system of education in Endowed Schools as therein defined to the requirements of the time or locality, and to apply certain charitable gifts to educational purposes. By the first of the above Acts power is given to the Charity Commissioners, with the consent of the governing body of any endowed school coming within the provisions of the Act, by a scheme to apply to educational purposes endowments given by any instrument not later than the year 1800 for any of the purposes following: (1) doles in money

or kind, (2) marriage portions, (3) redemption of prisoners and captives, (4) relief of poor prisoners from debt, (5) loans, (6) apprenticeship fees, (7) advancement in life, or any other purposes which have failed altogether or become insignificant in comparison with the magnitude of the endowment. But in any such scheme (a) regard is to be had to the educational interests of any persons of the same class of life as that of, or resident within the same area as, the persons who at the commencement of the Act were benefited thereby, (b) no open space at the commencement of the Act enjoyed by the public is to be used in any other manner than it might have been if the Act had not passed. The books are full of cases where the powers under these Acts have been very beneficially exercised, extending even in some cases to altering the character of a "free school" so as to admit of paying pupils and boarders being admitted, opening schools in connection with the Established Church to Dissenters, subject however in this latter case to the rule that the expressed intentions of the founder in matters of religion and religious instruction are not to be departed from so far as they are not contrary to law. It is also within the power of the Courts to order a complete removal of a school or institution from one district to another, if injustice will not be done thereby to persons having vested rights: *In re Meyricke's Fund*, 7 Ch. App. 700.* The Courts also have power from time to time to alter a scheme which has been settled by the Courts in a previous scheme, if circumstances require it, but only on the most substantial grounds and on clear evidence that the same does not work beneficially. *

Large powers in the same direction have also been given to the Charity Commissioners under the City of London

* But not so as to alter a scheme settled by Parliament, which requires another Act.

Parochial Charities Act, 1883, for dealing with the properties of charities in the City founded over 50 years before, which have grown to be disproportionately large in proportion to the objects for which they were originally established. Under this Act powers are given to classify the charities into two schedules—(1) property given to ecclesiastical purposes; (2) general charity property, with power to apportion property, where the objects embrace both purposes, between them. As to the former class, the property is still to be devoted to ecclesiastical purposes—(1) in the particular parish; (2) in the city generally; (3) for the maintenance of the fabrics of churches or the increase of endowments or giving theological instruction in more populous parts of the metropolis generally. As to the latter class, the property may be apportioned for any one or more of the following purposes:—(1) Promotion of the secondary education of the poorer classes, whether by means of lectures, exhibitions, or art and technical instruction; (2) in establishing libraries, museums, or art collections; (3) in providing open spaces; (4) in establishing provident institutions and working men's and women's Institutes; (5) generally for the physical and moral welfare of the poorer classes; (a) in the particular parish; (b) in the City generally; (c) in the case of by far the larger portion of the charities, of the metropolis generally. This power of extending the charities for the good of the metropolis is a most wise and beneficial one, and could not have been exercised under the ordinary doctrines of *Cy près* without the intervention of Parliament.

These wide powers given to the Commissioners are, however, so jealously guarded that there is little danger of injustice being done to any persons or bodies who might have benefited under the original foundation. In the first place, the Education Department must approve, the scheme must then come before the Privy Council, with power for

any one aggrieved to petition the Judicial Committee, and, lastly, annual reports are to be made to Parliament. These powers have been found to work well in practice, and it is on the lines of these Acts that reform in the administration of other charities having superabundant funds should be based.

The question remains on what principle the Chancery Courts, and more recently the Charity Commissioners have, independently of statute, applied the *Cy près* doctrine. The main and perhaps only certain rule which, in theory at least, has been universally recognised, is that, whether the Crown or the Courts are applying the gift, the original intentions of the testator should always be kept in view. Theoretically, the Court is always carrying out what it presumes from the instrument founding or benefiting the charity would be the intention of the donor under the altered circumstances. The difficulty is to apply it; for it is obvious that the rule must be an uncertain and elastic one, as the Court has to presume from a case where the donor has expressed his intention, what would be his intention under a different set of circumstances, which he probably never contemplated; and one cannot help coming to the conclusion from the history of the doctrine that the rule has been laxly or rigidly applied according to the bias of the particular Court or the general current of opinion for the time being. The rule has experienced various vicissitudes.* In early times the Court and the Crown alike seem to have paid but scant attention to the supposed intention of 'the pious founder.' When we get down, however, to Lord Eldon's time, the rule of adhering as closely as possible to the testator's intention was more rigidly adhered to. A

* See observations of Lord Eldon in *Moggridge v. Thackwell*, 7 Ves. 69, and of Sir Wm. Grant in *Cary v. Abbot*, 7 Ves. 492; and see *Brudenell v. Elwes*, 1 East 451, where Lord Kenyon said, " *Cy près* goes to the utmost verge of the law, and ye must take care that it does not run wild."

good instance of this is to be found in the case of *A.-G. v. Wansey*, 15 Ves. 231, where a bequest was made for apprenticing two boys of such as were members of a Presbyterian Congregation to which the testator belonged, and as lived in a certain parish. The fund having much increased, the surplus was applied by a scheme approved by Lord Eldon in placing out as apprentices (1) sons of members of the congregation within the parish; (2) boys of like denomination in other parishes; (3) daughters of members in the same manner; (4) sons of Presbyterians generally; thus proceeding strictly by a series of steps. Again, if several objects are named and one fails, one of the others is sometimes considered as *Cyprès* to that which has failed, and its being approved by the testator is an additional recommendation—see *A.-G. v. Ironmongers' Co.*, Cr. & Ph. 208. The tendency of late years, again, has been to allow a considerable latitude, and according to the doctrine laid down by Lord Westbury in *Clephane v. Lord Provost of Edinburgh*, L.R. 1 H.L. Sc. 487, while the end proposed by the testator is to be kept in view, the means to that end may be considered as capable of almost indefinite alteration. It is perhaps sufficient to say here that, as charities may be conveniently classified into four main divisions, viz., (1) educational; (2) eleemosynary; (3) religious; (4) general charitable purposes; so the Courts have considered themselves bound not to divest a charity which falls within one class to a purpose which falls within another. If the object is to promote education, then, though the particular object cannot be carried out, the fund must be applied to other educational objects; if eleemosynary, then, so far as is possible, without giving doles of money or in kind, which experience has shewn are generally productive of mischief, the fund is applied for purposes eleemosynary in the ordinary sense, and so on, always considering the class of persons and the locality intended to be benefited.

In 1853 Charity Commissioners were first appointed in accordance with the report of a Royal Commission, which recommended that the powers of the Courts of Equity should be transferred to a permanent administrative body, with power to give ready and effective expression to the doctrine of *Cy près* as administered by those Courts. By the Charitable Trusts Act, 1853 and 1860, powers were given to the Commissioners to make schemes on their own initiative with regard to charities with incomes of less than £50 a year, and with the consent of a majority of the trustees of such charities, with regard to those having a larger income. In exercising these powers the Commissioners have kept well within the limits of the doctrine as laid down by the Courts. If a larger diversion was required an application had to be made to Parliament under sects. 54-60 of the Act of 1853. But the intervention of Parliament was seldom necessary, and these sections, which had never been very workable, have practically become obsolete. In any case, when either the Commissioners felt doubts as to the proposed scheme being within the scope of the doctrine, or there are persons aggrieved, or any local or class opposition, the Attorney-General is certified to move the Court to approve the scheme recommended by them.

The evidence taken before the Royal Commission of 1884 brings out these points which are worth restatement, viz., (1.) That the Commissioners have adopted the classification theory, and not applied a charity of one class to purposes within another class: (2.) If a charity is not confined to a particular sect or denomination, the scheme is invariably undenominational: (3.) That care is taken that charitable funds should not be applied in aid or relief of the public rates, in accordance with the doctrine of the Courts ever since the time of Lord Hardwicke: (4.) That the trusts of a charity less than 50 years old are never meddled with. It is true that where there has and in the

nature of things cannot well be, a failure of objects as in the case of doles, but where the change in the conditions and habits of society and the ideas of mankind has called for a change in the application of the fund, the case hardly falls within the *Cy près* doctrine, but in these cases the doctrine has been stretched on the assumption that there has been a constructive failure of the mode of application. And from the earliest times a diversion of such gifts has been sanctioned in a series of cases which we cannot here discuss. Perhaps the clearest, as it is the most recent and instructive exposition of this principle, is to be found in the case of *The Campden Charities*, 18 Ch. D. 310, which marks an epoch in the history and development of the doctrine. There a sum of money had been given by Viscountess Campden, in 1643, to be laid out in the purchase of lands of the annual value of £10, one half to be applied to the better relief of the most poor and needy people of good life and conversation in the parish of Kensington, to be paid them half-yearly in the porch of the church, and the other half to apprentice one poor boy or man of the parish. The income had, with that of other gifts which were administered together, since increased to over £3,500. The Commissioners settled a scheme by which they appropriated the income—(a) to the relief of poor deserving parishioners, in case of sudden accident, sickness or distress; (b) for subscriptions to dispensaries and hospitals in the parish; (c) in annuities for deserving and meritorious persons who had resided seven years in the parish; (d) in the advancement in education of the children attending the elementary schools; (e) in premiums for apprenticeship and outfit of poor boys of the parish; (f) in payments towards secondary education; (g) for exhibitions at places of higher education; (h) in providing lectures and evening classes in the parish. Objections were raised by parishioners to any part of the fund being applied for educational purposes. On the

case coming on to be heard before a strong Court of Appeal, consisting of Sir G. Jessel, and Lords Justices James and Lush, the following propositions were laid down (1) that, considering the enormous increase of the income and the population of the parishi, and the change of circumstances and the habits of the people, the application of the income to educational and other charitable purposes was justifiable and ought to be confirmed; (2) that a long continued unauthorised *Cy près* application of funds by trustees was no ground of objection to a scheme directing a different application; (3) that the Court will not interfere with the details of a scheme of the Commissioners unless they have exceeded their authority, or the scheme contains something wrong in principle or law. The Master of the Rolls (Sir G. Jessel) justified the abolition of the dole charity by the change which had taken place in the habits of society, and the ideas and practices of mankind, and from the experience that this species of direct charity was eminently hurtful and demoralising to its recipients. This case shews the high water mark of the doctrine. But as it has been so authoritatively laid down in the Court of Appeal it may be assumed that the Commissioners will hereafter be within their powers in applying dole charities for educational purposes. It is perhaps in consequence of this decision that the Bill which was introduced in 1883 for increasing the powers of the Commissioners has not been proceeded with; for on this most important point its operation seems to have been anticipated. There were, however, other objects aimed at by that Bill which it would be highly desirable to attain, and notably those of transferring under sufficient safeguard the powers now vested in the Attorney-General and the Chancery Division to the Commissioners, and of doing away with the £50 limit so as to give the Commissioners the power given by sec. 4 of the Act of

1860 with regard to all charities. The great need, after all, is to give more power of initiative to this body, which is eminently qualified by experience to deal with the subject, and at very much less expense than by an application to the Court.

It need not, we think, be feared, that this power of interference with the intentions of 'the pious founder' will check the flow of charity. The evidence before the late Royal Commission shews that there is no reason for this apprehension, but rather that as the wants so the supply of charity increases year by year. It may even be that the fear of the reforming hand has operated beneficially in checking 'fads,' and encouraging testators to confine their gifts to reasonable and beneficial objects. If this is so, it would be an unmixed good. The multiplication of egotistical bequests having as their main object the connection of the donor's name with some particular foundation of his own, is a thing sincerely to be deprecated. Such charities serve no good purpose. The great want of the day is to concentrate charitable effort: for the greater the number of charitable institutions the greater the waste and dissipation of energy and resource. This fear, then, being removed, the reforms suggested above, which are mainly administrative, could scarcely provoke any serious opposition, or, if properly safe-guarded, prejudice vested interests.

But perhaps the time has come when the whole policy of the Mortmain Acts may be reconsidered. The particular reasons of the Legislature in passing the Act of 9 Geo. II., c. 36, were stated by Lord Hardwicke to be mainly two, viz., (1.) To prevent land from being inalienable; (2.) to prevent persons in their last moments from being imposed upon to give away their estate from their families. The former reason may still hold good to a certain extent; the latter is an anachronism. In the first place, if such be the object, it is not effectual, because it does not apply to

restrain gifts of personality, which since the Act has increased in value and importance out of all proportion to realty. As to the second, it is unnecessary to provide against such a contingency in an age tolerably free from superstition. "*Cessante ratione, cessat ipsa lex.*" Moreover, it frequently operates to disappoint a charitable purpose spontaneously conceived and likely to be beneficial to the community, but defeated through the donor's ignorance of the law or the clumsiness of the draftsman. But even with regard to the former reason, how illogical to say that a testator may not, e.g., bequeath money secured on mortgage, or tithes, or other chattels real, and yet may bequeath money which directly after his death may be invested by the trustees of the charity on mortgage. Even if the restriction as to actual devises of land were retained, there seems no good reason why securities on land should not be treated in their true light as securities for money, and why, if ultimately by foreclosure or otherwise they come to the hands of the donee in the shape of land, such land should not be compulsorily sold for the benefit of the charity. Again, why should the prohibition extend to every thing which, according to the pedantic phrase, savours of realty? Money to be derived from an imperative trust for sale is no more land than consols, and yet by a fiction of judge-made law invented to defeat charitable bequests it is called "impure personality" and held not a proper subject for such a bequest, while pure personality, which may represent the purchase-money of land sold just before the testator's death or the accumulation of rents, is not within the prohibition. If these Scholastic refinements were abolished, much of the contradictory tangle of decisions as to the exact point at which money directly or indirectly connected with or proceeding out of land ceases to be realty would be done away with.*

* See as to this the remarks of North, J., in the case of *In re David L. Buckley v. National Lifeboat Institution*, 41 Ch.D. 168 (where it was held that

Again, a greater power of modelling or modifying a testator's gift *Cy près* might well be given to the Commissioners or the Courts. What reason can there be in a law which says that a gift to establish a charity is void, but that one to endow a charity is good, because the rule of the Court is to consider the former gift as involving the purchase of land, but the latter as not doing so? Surely the *Cy près* doctrine might be applied here, and the gift satisfied without bringing land into mortmain. So long as the object of the restriction against bringing fresh land into mortmain is attained, it cannot be necessary to go further and bring within the prohibition of the law bequests which might well be carried out without infringing the law. It is treating what is after all a mere "*malum prohibitum*" as a "*malum in se.*" So with regard to other sets of cases where at present the *Cy près* doctrine is not applicable, e.g., where it is within the scope of a bequest for trustees to choose objects which are not strictly charitable, but where the testator shews a general charitable intention, it seems unreasonable that such general intention should perhaps be wholly defeated. It is even worth consideration whether, where a testator shews a general charitable intention, the Courts should not have the power to give the go-by to the particular intention expressed, which may be actually illegal by Statute, and so modify or divert the gift as to carry out such general intention without coming within the statutory prohibition. The accumulation of land in the possession of charities might easily be guarded against by making it illegal for them to retain more than a certain quantity of land, and by making more stringent the rule that all

a bond of harbour trustees was an interest in land, following *Knapp v. Williams*, 4 Ves. 430). "It is very unfortunate that in the recent Act, 51 & 52 Vict., c. 42, the various questions which are constantly arising as to what is and what is not pure personalty should not have been settled once for all." S.C. affirmed on Appeal, 43 Ch. D. 27.

charitable trustees should make periodical returns of the properties subject to their trusts to the Commissioners.

The Act passed in 1887 was unfortunate. Professedly, it was only a consolidating Statute, but the mere fact of consolidation puts the stamp of the approval of Parliament to Legislation which might well be entirely reconsidered in the interests of the ever-increasing claims of the Charitable Institutions of the country.

H. L. MANBY.

II.—INTERPRETATION IN ROMAN LAW.

IN any system of Law, the art (it is so called by Savigny) of Interpretation becomes a necessity as soon as public or private statements or documents come within the jurisdiction of a Judicial or other authority. By public statements or documents it is intended to include any directly or indirectly promulgated by the State. When rights of parties are to be determined, the determination must depend, where there is any obscurity or ambiguity, on the interpretation or construction of the whole or a part or even a single word of the verbal or written matter to be construed. Interpretation is a term not very easy of definition. As good as any is that of an American writer of half a century ago. It is "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text."* Interpretation, of whatever nature it be, differs on the one hand from Definition, inasmuch as it does not profess to go beyond the limits of the particular case, while Definition attempts a universal interpretation applicable to every case. Definition is earlier than Interpretation, for Philo-

* Francis Lieber, *Legal and Political Hermeneutics*. Boston. U.S., 1839

sophy is bolder than Law.' At a time when Interpretation must have been in its infancy, Socrates had established *τὸ ὄριζεσθαι καθόλου* as a distinctive feature of his teaching. Interpretation differs on the other hand from grammatical explanation in looking at times (in Roman Law especially) beyond the bare connotation of a term to the rights of parties depending on the meaning to be given to the term.

The divisions of Interpretation according to its nature have been very various. It may be, with Savigny, legal or doctrinal, and if legal, either authentic or usual.* (These terms will be explained later). It may be, with Voigt, *ex verbo*, *ex mente legis*, or *ex voluntate*.† Or it may be, with Bentham and Austin, genuine or spurious, if the former, grammatical or logical, if the latter, extensive or restrictive.‡ Of whatever kind it be, it requires, according to Baldus—and it is fairly obvious had Baldus never written it—*interpretabile*, *interpretans*, and *actum interpretantis*.§ Where the interpretation of a law is, in the language of Austin, spurious, where in fact it is, to use Savigny's terms, *Fortbildung* and not *Auslegung*, i.e., extension to matters not contemplated by the legislator, the function of Interpretation approaches very nearly to that of Legislation. The law as thus interpreted is not the old law but a new law. At Rome the *prætor* accomplished this by the theory of *æquitas*. It is a fundamental fiction of at least English law that the Judge only interprets and does not legislate.

The position of Interpretation in Roman law differs in one or two respects from that which it occupies in England. In England the word "construction" is used more generally

* *System*, bk. i., c. 4. † *Das Jus Naturale*, Vol. iii., *passim*.

‡ *Essay on Interpretation* in Vol. ii. of Austin's *Jurisprudence*. The "illusions upon existing law" of Austin, lect. 30, are examples of spurious interpretation. "Extensive" is derived from Roman law. Cf. *verba extensiva*, in *Dig.* xxxviii., 18, 6, 1.

§ *Ad librum primum Decretalium*, c. i., 15.

by lawyers than "interpretation," but the meaning of the words is no doubt identical. The cardinal principle of Roman law may perhaps be said to be the discovery of the intention (called in the *Digest*, *voluntas*, *mens*, or *sententia*) of those who used the words to be interpreted, of English law the discovery of the meaning of the words used.* Again, in England, a great part of the law of Interpretation is contained in books on Evidence; in the Roman system the Courts and practitioners had not reached the point of including under the head of Evidence a body of law which does not fall conveniently under any other head. This is one explanation of the fact that the strict English rules as to the admission of parol evidence to explain written words were practically unknown to Roman Law. They were not required, and therefore were not formulated.† Another difference is that Roman Law was inclined to proceed from general principles to cases, English from cases to general principles. The one was a deductive system, the other is an inductive. Hence, the greater importance of precedent in England as a guide to Interpretation. As to the subject matter to be interpreted, the construction of verbal contracts was more important in the Roman than in the English system owing to the universality of the *stipulatio* as a form of contract, while in England the Statute of Frauds and other Acts have tended to reduce the verbal contract within very narrow limits. Roman Law never attributed greater solemnity to the written contract, the *stipulatio* was

* Compare the words of Ulpian (*Dig.* I., 16, 6), *verbum "ex legibus" sic accipendum est, tam ex legum sententia quam ex verbis*, with those of Lord Denman in *Rickman v. Carstairs*, 5 B. & Ad. 663. "The question in this and other cases of construction of written documents is not what was the intention of the parties, but what is the meaning of the words they have used."

† The principal instances of admission of explanatory parol evidence in Roman law were to explain the intention of a testator by his habits of life or his domicil (*Dig.* xxx., 50, 3; xxxii., 75), and of a party to a stipulation by the rule existing where he was domiciled (*Dig.* I., 17, 34).

verbal, though written evidence of it was admissible. On the other hand, the construction of the products of indirect legislation, such as by-laws and rules of Court, so important in England, was from the nature of the case, of infrequent occurrence in Roman Law.* Roman Courts of Interpretation and Courts of Probate were never divided, as in England, where the Probate Division admits a will to probate, but the Chancery Division is usually the interpreting authority. The Roman jurists had not arrived at an accurate distinction between rules of Law in general and rules of Interpretation. Thus, the title *De Diversis Regulis Juris* † of the *Digest* contains many rules of interpretation which might have been better included under the previous title *De Verborum Significatione*, † and in the middle of the title *De Rebus Dubiis*, dealing almost entirely with interpretation, comes in a rule of law as to presumption of death.§

Interpres, Interpretator, interpretatio, interpretari, appear to be all words of comparatively late use in Latin. Their etymology is uncertain; perhaps that view is the best which connects them with the root occurring in the English “prate” and “prattle.” *Interpretatio* as a term of law does not appear earlier than Cicero.|| As a technical term of rhetoric it appears in the *uctor ad Horennum* ¶

* The difference becomes very noticeable in the Roman maxim corresponding to the English that a grant is to be construed (except in Crown grants) most strongly against the grantee. In Roman Law the rule is the same, but it is applied to *scrumo* (*Dig. I.*, 17, 67), *oratio* (*Id.*, 90), and *statio* (*Dig. xxxiv.*, 5, 26). In the Latinised form of the English maxim, *Verba fortius accipiuntur contra proferentem, verba* no doubt means *prima facie* written words. On the other hand, Roman Law allowed to *fides instrumentorum* the same force as *depositiones testium*, *Cod. iv.*, 21, 15.

† *Dig. I.*, 17.

‡ *Id.*, 16.

§ *Dig. xxxiv.*, 5, 22, 23.

|| *Existunt etiam siue injurie calumnia quadam et nimis callida sed malitiosa juris interpretatione. De Off.*, i., 10.

¶ It means the repetition of a phrase in different words of a similar import, the example given is *rempublicam radicibus cveristi, civitatem funditus dejecisti. Auct. ad Her.*, iv., 28.

(generally printed among Cicero's works) and in Quintilian.* It is used by Livy in a more popular sense.† In Greek, as in the Greek version of the proem to the *Digest*, it is represented by ἐρμήνεια. Sometimes, as in the *Basilica*, by ἐρμήνευσις.‡ Livy and Gaius use it in the sense of translation,§ a sense which its Greek equivalent sometimes bears in the New Testament. In the *Corpus Juris* the word (nowhere defined) seems to occur in two senses, one, and the usual one, that of explanation of the law,¶ the other, according to Brissonius, that of exception or limitation.** As a philosophical term, *interpretatio* is frequent in later writers, for instance, the *interpretatio naturæ* of Bacon. Spinoza applies what might very well be a legal rule to Biblical interpretation.†† *Interpres* is a word of rarer occurrence, at any rate in the *Corpus Juris*, though it is the word which occurs the earliest, being found in the *Curculio* of Plautus (iii., 64). Besides its ordinary use, as in *optima est legum interpres consuetudo*,†‡ it is used for the interpreter attached to

* ix., 3, 98. † *Nec traditur certum nec interpretatio est facilis*, ii., 8.

‡ Whence the term hermeneutics, now almost confined to Scriptural interpretation. It is, however, used of law in Lieber's work just mentioned, also in Eckhard's *Hermeneutica Juris*. Jena. 1750, and in Zachariä, *Hermeneutik des Rechts*. Meissen. 1805.

§ Livy, xxiii., 11., Gaius, iii., 93.

¶ For instance, S. Mark, xv., 22, "Golgotha, which is being interpreted, (μεθερμηνευόμενον) the place of a skull." It is so used too in 1 Cor. xii., 10, ἐρμήνεια γλωσσῶν. In the one place in which *interpretata* occurs in Dante, it means translation, *Par. xii.*, 80.

** *Interpretatio legis*, *Dig.* i., 3, 37; *legum*, xlvi., 19, 42; *fraudis*, i., 17, 79, &c. All the passages in which the words occur will be found most fully in Dirksen, *Manuale Latinitatis fontium Juris Civilis*. Berlin. 1837; see also Heumann, *Handlexicon zum Corpus Juris Civilis*. Jena. 1846 and 1884.

** *Sine aliquæ legis interpretatione*. *Cod.* ix., 9, 30. In the Theodosian Code (ix., 121), *interpretatio*, according to Gothofredus, is equivalent to *distinctio*.

†† *Ad Scripturam interpretandam necesse est ejus sinceram historiam adornare, et ex ea tanquam ex certis datis et principiis mentem auctorum Scripturae legitimis consequentiis concludere*. *Tractatus Theologico-Politicus*, c. vii.

†‡ *Dig.* i., 3, 37.

the Court of a provincial governor,* and for a *proxeneta*, or agent in a contract,† especially of *sponsalia*. The fee of such an agent was called *interpretativum* or ἐρμηνευτικόν.‡ *Interpretator* occurs only once in the texts of Roman Law.§ *Constructio* and *construere* are not used in a legal sense in the texts. *Construere* occurs, but only of building,|| *constructio*, properly a rhetorical or grammatical term, signifying either syntax or an apt collocation of words,¶ is used by the Roman Jurists only in the sense of either the act of building or the completed building.

The Roman Jurists attempted Definition with less success than Interpretation, a want of success of which they were themselves conscious.** Like the Greeks and the earlier English text-writers,†† they were often misled by false etymology, the result of knowing no language but their own. The etymologies of *legatum*,‡‡ *mutuum*,§§ *pignus*,|| *servus*, *urbs*,¶¶ and *telum* ** are sufficient examples of this.

* As in *Dig.* xlii., 15. 5, 3.

† In *Dig.* xliv., 1, 1, 6, it is said that a *stipulatio* is valid if the parties understand one another, *sive per se sive per verum interpretem*. The *verus interpres* according to some of the commentators, ought to be a notary or public officer.

‡ *Dig.* l., 14, 3.

§ *Cod.* vi., 29, 4.

|| *Cod.* viii., 12, 5.

¶ *Cicero, de Or.*, i., 5; *Brutus*, 78.

** *Omnis definitio in iure civili periculosa est; parum est enim ut non subverti possit.* *Dig.* l., 17, 202. This is remarkably similar to Bacon's objection to the danger of *inductio per simplicem enumerationem*.

†† Coke was a special offender in this way. Instances are frequent in Coke upon Littleton, e.g., *villa* and *vicus* (115b); *Arvi* (116b); *gavelkirk* (140a); *felony* (381a). Bracton is occasionally at fault, e.g., *communis* from *cum*, *unus* (222a).

‡‡ *Quod est legis modo, id est, imperative, relinquitur.* *Ulp.*, *Reg.* xxiv., 1.

§§ *Ut ex meo tuum fiat.* *Inst.* iii., 14, pr.

¶¶ *Pignus appellatum a pugno.* *Dig.* l., 16, 238.

|||| *Servus* from *servare* (so also in *Dig.* l., 5, 4, 2); *urbs ab urbo*; *urbare est aratru definire.* *Id.*, 239.

*** *Id.*, 233. These etymologies are not improved upon by the Byzantine historians. E.g., Procopius calls the Serbs Σπόροι, and they are so named, he says, because they lived σποράδην.

It may be that if *telum* had not been derived by Gaius from $\tau\eta\lambda\omega\iota$, it would not have been construed to mean anything that is capable of being thrown from the hand. Paulus is responsible for the somewhat obvious remark that *telum* need not be an iron weapon.* Sometimes a conflicting etymology is given, as that of *arrogatio* by Gaius.† A difference is observable between the definitions of technical terms coloured by philosophical theory or moral conceptions and those of purely legal import. The latter are generally far more successful than the former. Compare, for instance, the useless, if interesting, definitions of *jus*,‡ *justitia*,§ *nuptiae*, *dolus*,¶ with the really elegant definitions of *hereditas*,** *debitor*,†† *morbus*.††

The principal public documents which would need interpretation were those parts of the law which fell within the class of *jus scriptum*. They would include *leges*, *senatus consulta*, *plebiscita*, edicts of the *prætors* and *curule ædiles*, *responsa prudentium* when they had become authorised, and the legislative and judicial acts of the Emperor, whether *constitutiones*, *edicta*, *decreta*, *epistole*, *rescripta*, or *mandata*. The

* *Mos. et Rom. Leg. Coll.*, ii., 13.

† i., 99.

‡ *Ars boni et aequi. Dig.* i., 1, 1.

§ *Constans et perpetua voluntas suum cuique tribuendi. Id.*, 10. The word *voluntas* was an important one in Roman Stoicism. (See references in Ritter and Preller, *Hist. Philosophie*, § 419.) It was perhaps transferred thence to the sphere of law. In the Law of Wills it expresses what an English lawyer knows as intention, *Dig.* 1., 17, 12. It never means the will itself in the sense of the document expressive of intention.

¶ *Divini et humani juris communicatio. Dig.* xxiii., 2, 1.

|| *Machinatio quendam alterius decipiendi causa, cum aliud simulatur et aliud agitur. Dig.* iv., 3, 1, 2. This is from Servius, the one given by Labeo and preferred by Ulpian (*loc. cit.*) seems more wordy and even less valuable.

** *Successio in universum jus quod defunctus habuit. Dig.* 1., 16, 24. This is more scientific than Cicero's *pecunia quæ morte alicuius ad quempiam pervenit jure. Top.*, 29.

†† *Is a quo invito exigi pecunia potest. Id.*, 108.

‡‡ *Habitus cuiusque corporis contra naturam, qui usum ejus facit deteriorum. Dig.* xxi., 1, 1, 7.

unwritten law (*consuetudo, mores, or quod consensu receptum est*), might also stand in need of interpretation, the interpretation in this case being, as will appear later, nominally confined at first to the Jurists. Any one of these sources of law might be interpreted by almost any other, and an attempt will be made below to give examples of at least some of the numerous possible permutations which this would cause. The interpretation of private statements and documents would be most frequent in the case of contracts and wills. In the case of the latter Roman Law formulated a considerable series of rules, many of them of a very minute and technical character. Great legal value was given to interpretation which did not transgress the rules of law to which it was subject, in fact, it was put on the same level as an Imperial constitution.*

Interpretation as a system appears to have taken its rise soon after the XII Tables, as the earliest written Code† made it advisable that something more than the uncontrolled discretion of the judge should be applied to the explanation of the law.‡ In the Regal period

* *Dig. i., 3, 11.*

† The *jus civile Papirianum* mentioned by Pomponius (*Dig. i., 2, 2, 2*), is, if not mythical, at least post-regal. See Clark, *Early Roman Law*, p. 2.

‡ At Athens this discretion appears to have been exercised with more freedom than at Rome. The only controlling forces were moral rather than legal, *ἐπιείκεια* (Aristotle, *Eth. v.* 10, 6, the "sweet reasonableness" of Matthew Arnold), and *ἔθος*, which appears to have been regarded by Aristotle as a sufficient guide to interpretation, for laws, says he, *κατὰ τὰ ἔθη* are *κυριώτεροι τῶν κατὰ γράμματα νόμων* (*Pol. iii.*, 16, 9). *Equitas* (fairness or reasonableness), as an element in Interpretation appears in *Cod. i., 14, 1*. In the Greek of the age of Justinian *aequitas* is represented not by *ἐπιείκεια* but by *ἰσότης*, *Nov. viii.*, *Nov. xvii. 3*, sometimes in the *Basilica* by *τὸ δίκαιον*.

It is worthy of notice that the reduction to writing of the interpretation of the Mosaic Law was much later than that of Roman Law. The *Mishnah* was not committed to writing until A.D. 191. According to Rabbi Ishmael there are thirteen rules of interpretation. (They will be found in Hershon, *Talmudic Miscellany*. London. 1880. p. 167.) Of the five parts into which the

the King* and in the early Republic the Consuls were no doubt the repositories of legal interpretation.†

But the interpretation, in the words of Pomponius, was *sine lege certa, sine jure certo*.‡ The office of *prætor* was not created until nearly a century after the XII Tables. Interpretation of the XII Tables was of three kinds, first, authentic, or that contained in the Code itself, as where libel is defined, and where it is provided that the most recent law repeals all laws inconsistent with it; second, commentaries on the whole Code; third, interpretations of particular sections or words by the Courts or Jurists. The earliest commentator on the Tables as a whole, who is known by name, is Sextus *Ælius Pætus* (Consul B.C. 198), whose work on the Tables and their interpretation to date was known as the *Tripartita*.§ Another notable commentary on the Tables was that of Gaius. In his opinion the treatment ought to be historical. Interpretations by jurists of words and phrases in the text of the Tables are numerous. Instances are *fundi*,¶ *pauperies*,**

Mishnah was divided by Maimonides the first is *Perushim* or interpretations, the fourth is the edge of the law or decisions of the rabbis. As in Roman Law, there might be interpretations of interpretations (such as most of the *Gemara*), or commentaries on separate books, falling under the head of *Midrashim*. Authentic interpretation of conflicting views was often made by the *Bath Kol* (daughter of a voice), theoretically the direct judgment of God on the question. It is interesting to note that the use of the *Mishnah* (*deuterosis*), was prohibited under penalties by Justinian in *Nov. cxlv.*, 1.

* See especially the passage in *Livy* i., 26, which has caused some trouble to the commentators. *Tum Horatius auctore Tullo* (i.e., King Tullius Hostilius) *climenti legis interprete "Provoco" inquit.*

† Seeley, *Livy*, Book I., Introduction, p. 56.

‡ *Dig. i., 2, 2, 21.*

§ *Id., 38.*

|| *Dig. i., 2, 1.*

¶ *Quoniam usus auctoritas fundi biennium est, sit etiam cedium. At in lege aedes non appellantur, et sunt ceterarum rerum omnium quarum annuus est usus.* Cicero, *Top. 23.*

** *Pauperies*, or damage caused by an animal, extended to damage caused by any kind of quadruped. *Dig. ix., 1, 1, 2.*

tignum, arbor.†* There was also a considerable amount of both extensive and restrictive interpretation of a more general nature, e.g., the exclusion from succession to an intestate of all female agnates further removed than sisters was due to the *nimia subtilitas* of the interpreters of the Tables.‡ So *tutela patronorum* was attributed on the authority of Gaius§ to the Tables as interpreted, for it was not contained therein in express words. The word *filium* in *Si pater filium ter venuit filius a patre liber esto* was interpreted strictly, so that a single sale of any other descendant was sufficient for emancipation. It is supposed by some authorities that the words *super pecunia tutelare* occurring in Ulpian's version of the law of the Tables as to freedom of testation¶ were a gloss by an early interpreter.

As the body of the Law grew the interpretation grew with it, and from *Ælius Pætus* to Justinian there was an enormous mass of interpretative compilation. A list of many of the writers will be found in the well-known historical sketch by Pomponius in *Dig.* 1, 2, 2. One of the writers of the later Republic, C. *Ælius Gallus*, was the author of a treatise (of which not a fragment remains) under the name of *De Vrborum quæ ad Jus Civile pertinent Significatione*. There is a good deal of Interpretation in Cicero, especially in the *Topica*, but none of his works deal with the subject directly.

Of the Classical Jurists, the most noticeable works are the *Regulæ* and the *ad Edictum* of Ulpian and the *Sententia Receptæ* and the *ad Edictum* of Paulus. Other works will

* *Tignum non solum in aedificiis quo utuntur appellatur, sed etiam in vineis, ut est in XII.* Festus, s.v. *Tignum.*, cf., *Dig.*, xli., 1, 7, 10; xlvi., 3, 1, 1. The latter passage states that not only are *vinea* included under *tignum*, but all their appurtenances.

† Vines, ivy, olives, and osiers were construed to be *arbores*. Also dead trees whose roots were still in the earth. But not shrubs or mere stumps.

Dig. xlvi., 7.

‡ *Cod.* vi., 58, 14, 1.

§ i., 165.

|| Gaius, i., 132; Ulpian, *Reg.* x., 1.

¶ *Reg.* xi., 14.

be mentioned later. These writers also interpreted particular branches of statutory law, e.g., the *Leges Corneliae* and *Julia* and the *Sc. Tertullianum*, and Paulus is remarkably prolific in the construction of *legata*. He was of opinion, for instance, that in the bequest of a slave or an estate the *peculium* of the former and the fixtures (*instrumentum*) of the latter would pass.* Also that under the head of *instrumentum* were included herds and their herdsmen, but not the wives of the herdsmen.† They also attempted definition, not always with success, as Ulpian's definition of *legatum* sufficiently shews.‡ Q. Mucius Scævola wrote a treatise called *"Opus or Definitiones*, which is referred to in the *Digest*.§ The only works of this period dealing with Interpretation as a whole appear to be the *Noteæ Juris* of Valerius Probus (1st century) and the *Interpretamenta* of Dositheus (3rd century), of both of which fragments are extant. The former work was a kind of Law Lexicon, explaining the abbreviations used in practice. This of course was Interpretation of the most elementary character, probably for the use of laymen. The *Commonitorium*, or preamble to the *Breviarium* of Alaric (A.D. 506), warns readers that the contents of the Code are *excerpta vel clariori interpretatione confposita*. The texts, says Savigny, are sometimes explained or paraphrased, sometimes extended or modified, partly in accordance with local custom, partly in accordance with new laws, or illustrated by comparison with other passages. In some cases the *Breviarium* lays down *ista lex interpretatione non eget*. Attempts were made on more than one occasion during the Empire before Justinian to limit the

* *Sent.* iii., 6, 34.

† *Id.* 40. In *Cod.* xi., 38, 2, if the *fundus* were left *sicut instructus*, the rule was apparently different.

‡ Something left *modo legis*, *id est imperative*. *Reg.* xxiv., 1.

§ 1., 1/., 73. || *Geschichte des römischen Rechts*, c. viii., § 18.

right of Interpretation, especially by the famous Law of Citations of Theodosius II. as tutor of Valentinian III. in 426,* which was no doubt intended to close the canon of interpretative writing for all time, and to reduce Interpretation to a sum in arithmetic.

The intention of Justinian was at once to provide authoritative interpretation, and as supreme and final interpreter to forbid interpretation for the future. The well-known titles of the *Digest*, *De Verborum Significatione*† and *De Diversis Regulis Juris*‡ were, like the English Interpretation Act, 1889, attempts to clothe with statutory sanction a number of modes of Interpretation which had become established by decision or juristic opinion. The title *De Verborum Significatione* consists of 246 extracts from writings of jurists, of which 76 are from comments on the Edict.§ The list cannot pretend to be exhaustive. It is sometimes inconsistent with itself,|| sometimes obscured by unscientific etymology,¶ and sometimes labours a point with unnecessary repetition. Instead, for instance, of a single clause enacting, as does the English Act, that "words importing the masculine gender shall, unless the contrary intention appears, include females," the rule is laid down in a fragmentary fashion no less than ten times.**

* *Cod. Theod.* i., 4, 3.

† i., 16. The title of the Code with a similar name (vi., 38) deals only with *legata*.

‡ i., 17. These *regulae* were only general principles, not to be followed against reason. *Dig.* i., 3, 15.

§ The corresponding title of the *Basilica* is at the beginning of the work (ii., 2) and contains 237 paragraphs, some (as 229 and 230 of the *Digest*) being combined, others (as 191) being omitted. The position of 112 is changed. The Basilican title *De Diversis Regulis Juris* (ii., 3), follows the *Digest* exactly.

|| E.g., *Familia* in 40 and 195.

¶ E.g., *pignus* in 238.

** In 1 it is said that *si quis* includes males and females, in 40 that *servus* includes *ancilla*, in 52 that *patronus* includes *patrona*, in 84 and 116 and 122 that *filii* includes all children, in 152 that *homo* applies to both sexes, in

In the title *De Diversis Regulis Juris* there are several interpretations of single words which would have fallen better in the previous title.* Future Interpretation was prohibited by the Constitutions giving authority to the *Digest*.† To compose any commentary or any interpretation other than translation into Greek or brief summaries (*παράτιτλα*), like marginal notes to an English statute,‡ made the offender liable to punishment under the laws *de falsis*. This prohibition was, however, as might have been expected, of as little avail as the law of Valentinian in checking the evil complained of by the compilers of the *Digest*. Even in the lifetime of Justinian some of the very compilers themselves, such as Dorotheus, were authors of abridgments more diffuse than *παράτιτλα*. At the end of the ninth century another attempt, probably as unsuccessful as Justinian's,

163 that *puer* includes *puella*, and in 172 that *libertus* includes *liberta*. Similar rules also occur in other parts of the *Digest*. Thus brothers includes sisters, xxxii., 93, 3. Not only males, but females descended through males had the advantages of the *edictum Carbonianum*, xxxvii., 1, 2. But the word *filiae* does not include *filii*, xxxi., 45. A rule similar to that of the *Digest* is found in Quintilian, ix., 3, 63. Συνεζευγμένον jungit et diversos sexus, ut quum marem feminamque filios dicimus. Justinian's boast in Dante (Par. vi., 12), *D'entro alle leggi trassi 'l troppo e'l vano* is more poetically than literally justifiable. Whatever be the case with the *vano*, or obsolete, the *troppo*, or redundant, is by no means absent in the *Corpus Juris*, especially in Justinian's own Constitutions.

* Previous treatises under the name of *Regulae* had been published by Ulpian, Paulus, Marcius, Scævola, and Neratius. Strangely enough no extracts from these appear in the title *De Diversis Regulis Juris*, though they are to be found in other parts of the *Digest*. Only one *regula*, the *Regula Catoniana* (Dig. xxxiv., 7), seems to have had a distinctive name of its own. By the Glossators *regulae* with comments thereon were called *brocarda* or *brocardica*. In a modern German work *Regular-Jurisprudenz* is the name given by the writer to the first effort of Scientific Jurisprudence manifesting itself in *regulae*. (Jörs, *Römische Rechtswissenschaft*. Berlin. 1888.)

† *De Concept. Dig.*, 8; Δέδωκεν, 21; *Cod. i.*, 17, 21.

‡ Which are not to be read as part of the Act, *Sutton v. Sutton*, 22 Ch. D. 511. *Paratitla* was the title of a work by Cujacius.

at authoritative settlement of vexed questions was made by Leo the Philosopher.*

In addition to the writings of lawyers, a certain amount of unauthoritative exposition was attempted by non-professional writers, historians, grammarians, and essayists, such as Livy, Varro, Valerius Maximus, Aulus Gellius, Festus, Asconius, Donatus, Servius, Macrobius. Varro, for instance, commented on various legal subjects, such as wills and the *Lex Mænia*. The work of this class of writers is of antiquarian rather than of legal value. The explanations are sometimes absurd, for instance, Festus' derivation of *Provincia*,† and Donatus' of *Sepulcrum*.†

Interpretation, in works directly founded on Roman Law, is a subject of some interest. The *Commonitorium* has been already mentioned. The *Libri Feudorum* contain little that can be called interpretation. One instance is the commentary on the *Lex Conradi de Beneficiis*.§ There are a few definitions, such as that of *investitura*. The Salic and the other *Leges Barbarorum* had their interpreters. A well-known instance is the interpretation of the text of the Salic law, extending the prohibition of succession of women to Salic lands to succession to the Crown.** Interpretation was, of course, the express object of the *Glossatores* and their successors, who need only be mentioned here. The Canon Law made a digest of the rules of interpretation in sequence to an extent unknown in Roman Law. Of these rules there are 11 in the *Decretalstt* and 88 in the Text of Boniface VIII.†† They are founded on Roman Law, with

* *Leon. Const., pr.*

† *Provinciae appellantur quod populus Romanus eas prouicit, id est, auctoricit.*

‡ From *sine re pulca*. § ii., 34. || ii., 2. ¶ Tit. 62.

** Montesquieu, *Esprit des Lois*, xviii., 22; Maine, *Early Law and Custom*, c. v.

†† v., 41. Titles 40 and 41 bear the Roman law names, *De Verborum Significatione* and *De Diversis Regulis Juris*. ‡‡ iii., 12, 5.

considerable differences of their own, e.g., the insertion of rules of evidence * and of purely ecclesiastical and feudal matters.† Among the more important of the writers expressly dealing with Interpretation as a whole or as applied to particular branches of law may be named Grotius,‡ Suarez,§ Montesquieu,|| Savigny,¶ and Austin.** Writers of less eminence are Azo,†† Gallinus,†† Mantica, §§ Decius,||| Paul Carrara, ¶¶ Bronchorst, *** Averanius, ††† Brissonius,††† Mylius, §§§ and Cramer.||| Many other names will be found under the head of *Interpretatio* in Lipenius. ¶¶¶

It has been already stated that the Roman lawyers formulated no body of rules on Interpretation, as did the Canonists. The rules have to be extracted from the *Corpus Juris* as a whole, and to lay them down once more, as so extracted, would be simply to repeat what has already been

* Such as *Tormenta, indiciis non precedentibus, inferenda non sunt*, v., 41, r. 6.

† Such as *Pro Spiritualibus homagium non præstatur*, r. 11.

‡ *De Jure Belli et Pacis*, ii., 16 (*De Interpretatione*).

§ The sixth book of Suarez, *De Legibus*, is on the interpretation of human laws.

|| vi., 3. Montesquieu, as might be expected, draws a distinction between Interpretation in monarchies and in republics. In the former the judge seeks the *esprit* of the law when it is not precise, in the latter he follows the letter of the law. This view is illustrated by the French *Code Civil*, § 1,156. *On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes.*

¶ System, bk. i., c. 4.

** Essay on Interpretation in Vol. ii.

†† *Brocardica*. Basel. 1567. †† *De Verborum Significatione*. Venice. 1582.

§§ *De Conjecturis Ultimarum Voluntatum*. Frankfort, 1589; Geneva, 1631.

||| *De Regulis Juris*. Lyons. 1610.

¶¶ *De Litterali ac Mystica Regularum Juris Canonici Interpretatione*. Bologna. 1617. *** *De Regulis Juris*. Leyden. 1624.

††† *Interpretationum Juris Libri Quinque*. Leyden, 1715 and 1751.

††† *De Verborum Significatione*. Magdeburg. 1743, followed by Dirksen and Heumann, already mentioned.

§§§ *De Usu Interpretationis Juridicae in Negotiis Civilibus Contractibus Iisque Feudalibus*. Leipzig. 1745.

¶¶¶ *De Verborum Significatione*. Kiel. 1811.

¶¶¶ *Bibliotheca Realis Juridica*. Leipzig. 1757. Vol. , p. 637.

so excellently done by Pothier.* It may however be of interest to notice one or two of the more important rules, and thence proceed to a more minute examination of the interpretative authority. The rules, according to Paulus, do not make law but spring from pre-existing law.†

Among the cardinal rules governing interpretation of all kinds of subject-matter, the one reiterated with the most persistent repetition was that which occurs early in the *Digest* in the form *benignius leges interpretandæ sunt.*‡ The same principle recurs in numerous other passages, especially in regard to wills,§ and is found in the rule that in an ambiguous penal law the milder punishment is to be inflicted, and that beneficial laws are to be liberally,¶ corrective, narrowly,** interpreted. It is, however, limited in application by the rule that no reason of law or benignity of equity is to be interpreted into severity by turning what was introduced for the benefit of man to his disadvantage.|| Connected with the rule as to benignity is the one as old as Cicero, that *aequitas* is to be observed.||‡ It is the only principle of decision recommended to the provincial judge.||§ A rule of law is not to be followed against reason.||.

* *Pandectæ*, Vols. xxii. and xxiii. † *Dig.* i., 17, 1. ‡ i., 3, 18.

§ Gaius, iii., 109; *Dig.* i., 4, 3; xxxiv., 5, 10, 1, and 24; xxxviii., 17, 1, 6; i., 17, 12, 20, 56, 122, 155, 168, 179, and 192. A similar principle is found in i., 5, 8, that the *status* of children is not to be made worse owing to a badly drawn instrument; and in i., 17, 173 where the rule is stated that a man is not to be condemned to pay all that he has, but enough must be left to preserve him from want. The section of *Magna Chārta* (§ 20 of the Charter of John) as to excessive fines is a close parallel to this. The principle has been carried further in modern times by the statutory exemption of a limited amount of property from the operation of execution and bankruptcy.

|| *Dig.* xlvi., 19, 42. The example of this rule, given by Baldus, is that if there be a law against shedding blood, it cannot be held to apply to physicians or barber-surgeons.

¶ *Dig.* i., 4, 3.

** *Cod.* iii., 28, 35, *pr.*

†† *Dig.* i., 3, 25.

||‡ Cicero, *Top.* 23; *Dig.* i., 17, 90; *Cod.* i., 14, 1. In *Inst.* ii., 20, 23; *benevolentia* appears to be used as the equivalent of *aequitas*.

||§ *Nov.* xvii., 3.

|||| *Dig.* i., 3, 24.

Pains should be taken to support a law advantageous to the State.* A judge is not to decide without examining the whole law.† Later laws are to be read with earlier, unless they are repugnant.‡ In actions and exceptions, where there is ambiguity, the subject-matter should be treated *ut magis valeat quam pereat*.§ In case of obscurity, the more likely or customary course is to be followed.|| No interpretation is good if contrary to the express words of a Constitution,¶ or if it lead to an absurdity.** But *rescripta contra jus elicita* are to be rejected by all judges.†† When the law allows something that is past, it forbids it for the future.†† No change is to be made in a settled interpretation.§§ Two negatives make an affirmative.||| Words of futurity may include the past.¶¶ General words include special,*** and singular plural.††† The whole includes a part.††† At times the moral element always noticeable in Roman Law appears. There is a Ciceronian ring about *Non omne quod licet honestum est*,§§§ and *Semper in conjunctionibus non solum quid licet considerandum est, sed et quid honestum sit*,††† and a flavour of Stoicism in *Quae rerum natura prohibentur nulla lege confirmata sunt*.¶¶¶ Heavy penalties are enacted against fraudulent interpretation.**** *Cavillatio*, or sophistical interpretation, is more than once denounced.††††

* *Dig.* xxxv., 1, 64, 1.

† *Dig.* i., 3, 24.

‡ *Id.*, 28.

§ *Dig.* xxxiv., 5, 12.

|| *Dig.* i., 17, 114.

¶ *Cod.* ix., 8, 1.

** *Dig.* ix., 2, 51, 2.

†† *Cod.* i., 19, 7.

††† *Dig.* i., 3, 22.

§§ *Id.*, 23. This is the necessary law of *stare decisis*, which did not become a principle of decision until the Empire.

||| *Duobus negativis verbis quasi permittit lex magis quam prohibet. Dig.* 1., 16, 237. ¶¶ *Id.*, 123. *** *Dig.* i., 17, 147. ††† *Dig.* i., 16, 158.

†††† *Dig.* i., 17, 113. This is in accordance with Cicero's rule (*Top.* 23), *quod in re maiore valeat, valeat in minore.*

§§§ *Id.*, 144.

||| | *Id.*, 197.

¶¶¶ *Id.*, 188.

**** *Nov.* clx.

†††† As in *Dig.* xxxviii., 17, 2, 44. *Cavillatio* is something like *interpretatio* in the secondary sense, already noted, in which it is used in the Theodosian Code. In Aulus Gellius v., 5, it bears a less technical meaning. *Cujuscemodi joco cavillatus est Antiochum regem Pænus Hannibal.* The fact that a *cavillatio* was *joco* would probably not have been a very good defence to a Roman judge guilty of it.

That conflicting interpretations existed in fact, even after the time of Justinian, is obvious from the introduction to the Leonine Constitutions. Up to Justinian they were of course very numerous, in fact Justinian himself acknowledges the contradictions (*antinomia*) of the first edition of the Code.* One of the best known cases is that of *emphyteusis*. It had been doubted whether it were a contract of hiring or sale. Zeno by a Constitution declared it to be neither, but a contract of a special nature.† The well-known building laws of the same Emperor were intended to settle conflicting interpretations.† Numerous other instances occur in the texts of Roman Law. A late example is *Nov. clxi*.

A few examples of the interpretation of one kind of law by another will now be given. It will be understood that in most cases the list could be indefinitely extended; as it stands it is simply illustrative, not exhaustive. In the time of Justinian, as for centuries earlier, the Emperor was the supreme and unerring interpreter,§ especially where any difference arose between *jus* and *æquitas*.: This was authentic interpretation in the primary sense of the word, i.e., interpretation by the legislator himself.¶ Such interpretation was placed on equal terms with a *constitutio*.** During the Republic interpretation by any legislative body,

* *Cod. i.*, 17, 1, 8.

† *Cod. iv.*, 66, 1.

‡ *Cod. viii.*, 10, 12.

§ *Cod. i.*, 14. 9 and 12.

|| *Inter equitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere*. Constantine in *Cod. i.*, 14, 1.

¶ *Est autem non raro necessaria legis interpretatio, quam solus quidem facit legislator in quantum interpretatio vim legis habitura est*. Voet, *ad Pandectas*. iii., 18. *Authenticus* in the language of Roman law means original, *authenticæ rationes*, *Dig. x.*, 2, 8, *pr.* In the form *authenticum* it means an original document, *Dig. xxii.*, 4, 2. Hence the name *Authenticum* for the Latin version of the Novels. It was a question debated by the casuists whether an authentic interpretation needed promulgation. See Alphonsus Liguori, Vol. i., p. 107; Vol. iv., p. 1,027 (Paris edition, 1862). Another sense in which authentic interpretation is used will be found below where contracts are treated of.

** *Dig. i.*, 3, 11.

such as the Senate or the *cōmitia*, would have equally deserved the name of authentic. Authentic interpretation may be by means of the law in which the interpreted words are contained, or by another law, *e.g.*, in England interpretation of an Act of Parliament may be by an interpretation clause in the Act itself, by the Interpretation Act, 1889, by a special explanatory Act (as the Secretary for Scotland Act, 1889), or by comparison with another Act *in pari materia*. Authentic interpretation by an interpretation clause in any kind of statutory law is almost, if not altogether, unknown in the Roman system. As to the interpretation of public documents, the interpretative authority may be divided into four classes, the edict (including its developments in the Imperial period, *rescripta*, *epistolae*, *decreta*, *mandata*, and *constitutiones*, when they affect only the rights of individuals), statutory law (*leges*, *plebiscita*, *senatus consulta*, and most *constitutiones*), jurists, and *consuetudo*. Each of these might be interpreted by one of the same class or one belonging to another class, unless perhaps jurists by *consuetudo* and *consuetudo* by itself. Interpretation by *consuetudo* corresponds to the usual interpretation of Savigny, by jurists to the doctrinal.

Edict by edict.—Cases of this kind under the Republic are not to be found recorded, as each *prætor* was in the habit of adopting the interpretation of his predecessors as a part of his own edict. There are a few cases of such interpretation later, *e.g.*, a rescript of Marcus Aurelius* dealing with manumission by will was interpreted by Constitutions of Gordian† and Justinian.‡

Edict by Statute.—The most conspicuous instance of this was the recognition by *Nov. cxviii.* of the system of cognatic succession introduced by the *prætor*, and recognised by Pomponius in the well-known maxim *jura sanguinis nullo*

* *Dig. xl.*, 5, 2.

† *Cod. vii.*, 2, 6.

‡ *Id.*, 15.

*jure civili dirimi possunt.** Another instance is the *actio injuriarum*, the penalty in which, whether originally founded on *morest* or on the XII Tables, was afterwards regulated by the *prætor* and at a later date was the subject of statutory sanction.† The words *furti* and *bonorum raptorum* in the edict as to *infamia*§ were interpreted by a Constitution of *Severus* in 197.

Edict by Jurists.—This is one of the most prolific sources of Roman Law, and the greater part of the *Digest* consists of such interpretation. *Gaius*, *Ulpian*, *Paulus*, and others wrote treatises on the edict, *Gaius* on the *Edictum provinciale*, and *Ulpian*, *Paulus*, and *Javolenus* on the edict of the curule ædiles. Extracts from all these are contained in the *Digest*. Familiar examples of juristic interpretation of the edict are those relating to *infamia*,¶ restitution by sailors, innkeepers, &c., ** *pacta*, †† conveyances in fraud of creditors, †† funerals, §§ goods obtained by robbery, || and wreck.¶¶ A good instance of the practical working of interpretation of this kind is afforded by the Edict of the curule ædiles dealing with sale.*** According to *Labeo* the edict applied to both movables and immovables.††† Its strict words *adversus quod dictum promissumve fuerit* were liberally interpreted by *Gaius* to mean that words of commendation did not import warranty, e.g., in a slave alleged to be steady, philosophical gravity was not to be expected.††† The words of the edict *morbi vitiique* were, in *Ulpian*'s opinion, inserted by the ædile *tollendæ dubitationis*

* *Dig.* I., 17, 8.

† According to *Paulus*, *Sent.* v., 4, 6, it was so introduced. According to other authorities it was based upon the XII Tables. See *Inst.* iv., 4, 7.

‡ The Constitutions promulgated from *Alexander Severus* to *Zeno* are contained in *Cod.* ix., 35.

§ *Dig.* iii., 2, 1.

|| *Cod.* ii., 12, 2.

¶ *Dig.* iii., 2.

** *Dig.* iv., 9.

†† *Dig.* ii., 14, 7, 7.

††† *Dig.* xlvi., 8.

§§ *Dig.* xi., 7 and 8.

||| *Dig.* xlvi., 8.

¶¶ *Dig.* xlvi., 9.

*** *Dig.* xxi., 1.

††† *Id.*, pr.

††† *Id.*, 18.

causa, a difficulty having arisen with regard to Sabinus' definition of *morbus*.*

Edict by Consuetudo.—No doubt much of that part of the Consuetudinary Law which had not been constituted Statutory Law by the XII Tables had been absorbed in the edict † by the time it became perpetual. *Infamia* probably affords an example of such adoption. *Consuetudo* must afterwards have tended to become written law by adoption in the judicial and legislative provisions of the Emperors. In theory, however, it remained as at first *optima legum interpres*,‡ for it was itself in the place of *jus* and *lex*,§ held the same rank as precedent, and might, if it fulfilled certain conditions, be as valid as a *perpetua lex*.¶ In those rules of law which originated in *consuetudo*, such as *arrogatio*, *patria potestas*,** and some of those relating to the tenure of *Emphyteusis*,†† evidence of custom would, no doubt, have been admissible to explain the law even when adopted in the edict. The final blow was given to *consuetudo*‡‡ as such by Leo the Philosopher, who made invalid all *consuetudines* not approved by the Emperor. §§

Statute by Edict.—This is not very common, but an instance occurs in the declaration of the *prætor* that he would grant *bonorum possessio* in accordance with the terms of a *lex* or *senatus consultum*, but only where there was no vesting of the *hereditas* by virtue of the XII Tables.||

Statute by Statute.—The *Lex Cornelia* was explained by *amplissimus ordo*, perhaps a subsequent amendment at the

* *Id.*, 7.

† Itself originally part of the *jus consuetudinis*. *Cic. de Invent.* ii., 22.

‡ *Dig.* i., 3, 37.

§ *Id.*, 33.

¶ *Id.*, 38.

|| *Cod.* viii., 53, 8.

** *Dig.* i., 6, 8.

†† As, for instance, the interest payable, *Cod.* i., 2, 25, 4.

‡‡ It should be noticed that *consuetudo* is also used for the habits of a testator considered as a means of discovering his intention, *Dig.* xxxii., 75. In *Nov.* lxxvi., *pr.*, *consuetudo hominum* is used for the society of the world from which a nun withdraws herself.

§§ *Leon. Const.* i.

||| *Dig.* xxxviii., 14.

suggestion of Sulla himself.* The *Lex Julia de vi* was interpreted by Honorius.† Numerous Constitutions were at different times promulgated in explanation of the *Lex Falcidia*,‡ e.g., one of Hadrian's enacting that the provisions of the law should apply to *legata* bequeathed to the Emperor.§ Justinian in *Nov. i.* also explains this *lex*, and at the same time takes the opportunity of expressing his horror at the *ambages* (*περίοχοι*) of the *Sc. Pegasianum*. The *Lex Falcidia* was also the subject of two other Novels, the latter of which made it no longer applicable in the case of gifts to pious uses. The ambiguities of the *Lex Julia Miscella*,¶ and of a previous Constitution of Leo on the subject of second marriages** were removed by Justinian. Two of the Novels were published with the express object of interpretation of previous Constitutions.††

Statute by Jurists.—A large number of monographs on different branches of statutory law were written by jurists, among others, in addition to those already mentioned, those of Gaius on the *Lex Julia et Papia Poppaea* and the *Sca. Urphilianum* and *Tertullianum*.‡‡ A considerable part of the *Sententiae* of Paulus consists of interpretation of various kinds of statutory law; he also wrote commentaries on (*inter alia*) the *Sca. Turpilianum* and *Libonianum*. The

* Paulus, *Sent.* v., 25, 6.

† *Cod.* ix., 12, 9.

‡ *Cod.* vi., 50.

§ *Id.*, 4.

|| *Nov.* cxix., 11; cxxxii.

¶ *Cod.* vi. 40, 2.

** *Nov.* lxviii.

†† *Nov.* liv.; lxxvi.

‡‡ The German and Dutch jurists published numerous works on the Roman *leges*. The *Lex Aquilia* was a special favourite, and it is curious to note that no express commentary on this *lex* appears to have been written by any Roman jurist. Lipenius, Vol. i., p. 820, gives a list of no less than 28 German and Dutch commentaries. There was also the commentary of the Spaniard Juan Suarez de Mendoza (Salamanca. 1649), and that contained in the *Lucubrationes* of Caimus (Padua. 1654). As lately as 1886, the *Lex Aquilia* was edited by Dr. Grueber, Reader in Roman Law at Oxford. Next to the *Lex Aquilia* the *Lex Rhodia* held the place of honour as a material for comment by the jurists of the seventeenth century.

commentary at times took the form of a *brevis interpretatio* or compendium.* One or two examples of construction of statutory law may be given. They are very numerous in the *Digest*. The word *pecudem* in the *Lex Aquilia* was interpreted by Gaius to include swine, but not dogs or animals *feræ naturæ*.† *Ruperit* in the same *lex* was, according to Ulpian, understood as *corruperit* by the ancients.‡ *Dominus* in the *Sc. Silianum* included one who had the reversion, though the usufruct was in another.§ *Judicata*, *transacta*, and *finita*, in the *Sc. Tertullianum* meant decided by one who had jurisdiction, compromised *bonâ fide*, so that the compromise was effective, and concluded whether by consent or by prescription.|| *Mutua pecunia* in the *Sc. Macedonianum* applied to barter.¶ A good example of extensive interpretation is that of an unnamed *senatus consultum* of Hadrian's reign dealing with *hereditatis petitio*. The *senatus consultum* strictly affected only claims by the *fiscus*, but Ulpian says that there is no doubt that its provisions were applicable where the claim was by a private person.** An example of restrictive interpretation was that of the Constitutions exempting a senator's freedman who was his man of business from the office of tutor. This was interpreted to mean that only one freedman in any senator's house was exempt.††

Statute by Consuetudo.—Here the influence of *consuetudo* would probably be felt to a smaller degree than in the interpretation of the Edict, nor does any actual instance of

* As that mentioned by Paulus in *Mos. et Rom. Leg. Coll.*, iv., 2, 1. The *brevis interpretatio* is no doubt synonymous with the *interpretatiuncula* of St. Jerome. The *Breve Edictum* or *Brevium Edicti* of Paulus (named in *Dig.* 1., 17, 148) was no doubt of the same nature. Works of this kind of course differ from compendia of the whole law, like the *Institutes* of Gaius and the *Enchiridion* of Pomponius.

† *Dig.* ix., 2, 2.

‡ *Id.* 27, 13.

§ *Dig.* xxix., 5, 1, 1.

|| *Dig.* xxxviii., 17, 1, 12.

¶ *Dig.* xiv., 6, 7, 3.

** *Dig.* v., 3, 20, 9.

†† *Fragg. Vatic.*, 132.

it appear to occur in the *Corpus Juris*. The only rule affecting the matter seems to be an extract from a Constitution of Constantine, which says that the authority of custom and long user is not contemptible, but it cannot avail to overcome reason and law.*

Jurists by Edict.—The Edict would no doubt adopt the opinions of jurists who had recommended themselves to the predecessor of the *prætor* who adopted them, but probably not by name, as there is no trace in the remains of the Edict of the mention of any jurist's name. This is the case both before and after the conferring of the *jus respondendi* on the patented jurists.

Jurists by Statute.—Many of the instances of this kind of interpretation are in the nature of authoritative settlements of vexed questions, especially those existing between the Sabinians and the Proculians. An early instance is a Constitution of Antoninus Pius deciding in favour of the latter on the question whether or not the legatee in a *legatum per vindicationem* acquires the property immediately on the acceptance of the *hereditas* by the *hres*.† In favour of the Sabinians was a Constitution of Justinian that a will was revoked by the birth of a *postumus*, even though he died immediately after birth.‡ In some cases there is no mention by name of the conflicting schools of law, but simply an allusion to differences of opinion.§ Many questions, were, however, still left unsettled even by Justinian. For instance, it was uncertain whether a *pupillus* could contract a *naturalis obligatio* without the authority of his tutor. The Law of Citations (already mentioned) was

* *Cod.* viii., 53, 2.

† *Gaius*, ii., 195.

‡ *Cod.* vi., 29, 3.

§ As in *Cod.* viii., 38, 13, where there is no more definite reference than *vetoris juris altercationes*.

|| *Pro*; Papinian, Paul, Ulpian; *Dig.* iii., 5, 3, 4; xxxv., 2, 21, *pr.*; xlvi., 2, 1, 1; 3, 95, 4. *Contra*; Rufinus, Neratius, Antoninus Pius, *Dig.* xii., 6, 41; xliv., 7, 59; *Cod.* viii., 39, 1.

for a century a mechanical mode of attempting to settle juristic differences. Its principle was adopted by the casuists, and is still of some importance in Roman Catholic theology.

Jurists by Jurists.—One of the earliest commentaries of this kind must have been that of Granius Flaccus, a jurist of the late Republic, on the *Jus Papirianum*.* This *jus*, whether mythical or not, must have been the opinions of a jurist rather than a body of statutory law.† Under the Empire Pomponius, Ulpian, and Paulus all wrote commentaries on Sabinus. Pomponius also wrote *Lectiones* on Scævola, Paulus on Neratius, &c. The works of Papinian, Africanus, and Scævola called *Quæstiones*, that of Modestinus called *Differentiae*, and that of Julian *De Ambiguitatibus* were no doubt attempts to settle vexed questions on which jurists had entertained a diversity of opinion.‡ Where the authority of jurists was not sufficient, and perhaps where the breach had become too wide, the aid of legislation was, as has been said, invoked. An example of interpretation by Paulus of conflicting opinion is afforded by the law of sale. Sabinus and Cassius thought that sale included barter, Nerva and Proculus that barter was exchange, not sale. In spite of

* Cited by Paulus in *Dig.* I., 16, 144.

† Clark, *Early Roman Law*, p. 2.

‡ This form of treatise, no doubt founded on those of the Roman jurists, became a favourite one with writers on both secular and ecclesiastical law. Of the former Bynkershoek's *Quæstiones Juris Romani* is a familiar example. Of the latter the *Quæstiones* in the *Decretum* of Gratian are probably the earliest instances. The form was continued by S. Thomas Aquinas in his *Quæstiones Disputatae*, and reached its height in the casuists, especially Sanchez. The doubts for the most part arose from diverging interpretations. The *Speculum Juris Canonici* of Peter of Blois gives a considerable amount of such antinomies of interpretation. It is a work similar only in name to the German *Sachsenspiegel* and *Schwabenspiegel* and the English *Mirror of Justices*.

Sabinus' citation of Homer in support of his opinion, Paulus decided in favour of the Prōculian views.*

Consuetudo by Edict.—The law of *infamia* is an example, according to modern opinion, of this kind of interpretation. The *prætor* simply adopted what was already *moribus constitutum* as interpreted by the *prudentes*,† and the *edict* was afterwards still further interpreted and modified by statutory law.‡ A relic of the old consuetudinary law not adopted by the edict was the infliction of *infamia* on those who brought actions against parents and patrons, for though, says Julian, they are not condemned by the words of the Edict, they are so *re ipsa et opinione hominum*.§

Consuetudo by Statute.—At Rome as in England, early legislation was no doubt frequently, to use an English phrase, declaratory of the common law, whether secular or religious. Among statutory recognitions of a sanction originally religious may be included the devotion to the Infernal Gods of the striker of a parent, provided by the laws attributed to Servius Tullius,|| the same penalty in the XIIth Tables against the patron who wronged his client, and the vicarious sacrifice of a ram as a purification of involuntary homicide—also contained in the Tables. The *tutela* is regarded by many authorities¶ as founded originally

* *Dig.* xviii., 1, 1.

+ *Dig.* iii., 2.

‡ *Cod.* ii., 12.

§ *Dig.* xxxvii., 15, 2. Possibly the term *ignominia*, sometimes used as in *Dig.* xl., 12, 1, 1, may signify a kind of *infamia* which carried with it only a moral stigma. Dirksen, however, identifies it with *infamia* properly so called. Almost the only legal recognition of anything like *infamia* in English law is the right given to the General Council of Medical Education and Registration to adjudge a medical practitioner to have been guilty of infamous conduct in any professional respect, the penalty being erasure of his name from the register, 21 & 22 Vict., c. 90, s. 29. The latest case on the subject is *Leeson v. General Council*, Court of Appeal, 43 Ch. D. 366.

|| *Si parentem puer verberit ast olle plorassit puer divis parentum sacer esto. Festus, s.v. Plorare.*

¶ *E.g.*, *Aulus Gellius*, v., 13, 2.

on *consuetudo* recognised by the Tables and afterwards regulated by a large body of statutory law from the *Lex Atilia* (before B.C. 186) to the legislation of Leo the Philosopher.* The burial laws of the Tables were perhaps in the same position. They were regulated by extensive and minute legislation in the later Empire, both as to the sanctity of the burial ground and the monopoly of funeral guilds.† The punishment of parricide, defined originally *more majorum*, was confirmed with a variation by a Constitution of Hadrian.‡

Consuetudo by Jurists.—In the theory of Roman Law the *prudentes* were the sole interpreters of the unwritten part of the *jus civile*. Such at least is the view of Pomponius.§ Examples of such interpretation are fairly numerous. The invalidity of gifts between husband and wife is said by Ulpian to be *moribus receptum*. This law was interpreted by himself as well as by Gaius, Paulus, and others.¶ Another instance is universal succession by *arrogatio* and *in manum conventio*, said by Gaius to be customary.** The interpretation of the customary rules of *arrogatio* by the jurists is contained in the *Digest*,|| but that on *in manum conventio* has not been preserved, no doubt because that mode of universal succession had been long obsolete when the *Digest* was compiled. *Mancipatio* and *cessio in jure* were, on the authority of the Vatican Fragment,†† confirmed as pre-existing institutions by the XII Tables. Obsolete in the time of Justinian, even before the formal abolition of the distinction between *res mancipi* and *res nec mancipi*,††† they had been interpreted by previous jurists, especially Gaius and Ulpian. There is a considerable

* *Const.* xxxiv. † See, for instance, *Cod.* iii., 44; *Nov.* xliii., 5x.

‡ *Dig.* xlvi., 9, 9, *pr.* § *Dig.* i., 2, 2, 12. || *Dig.* xxiv., 1, 1.

¶ *Dig.* xxiv., 1, is a lengthy collection of such interpretations.

** iii., 82. †† i., 7. ‡‡ 50. §§ *Cod.* vii., 31.

amount of juristic interpretation of the originally customary burial laws mentioned above.*

The construction of contracts and wills is determined by principles of a nature rather different from those which have been hitherto considered. In the first place the interpreting authority would in most cases be a judicial one, whether centumviral court, *prætor*, or emperor, or quasi-judicial, as the *prudentes*. Authentic interpretation in the sense of interpretation by the legislator would be rare, though it would often occur in its secondary sense of interpretation by the parties themselves. In the second place the interpretation would conclude simply the rights of private persons, not lay down a law to be binding generally for the future.† All the general rules above cited would apply to contracts and wills, but in addition they were subject to special rules of their own.

Contracts.—Interpretation was subject to two great rules of public policy, *Jus publicum privatorum pactis mutari non potest*‡ (in another form *Privatorum conventio juri publico non derogat*,§) and *Privatis pactionibus non dubium est non laedi jus ceterorum*. Connected with these, but of narrower application, was the rule that *pacta* contrary to the *jus civile* were void.¶ On the other hand *pacta* could be entered into contrary to the provisions of the edict of the *ædiles*.** Among the more important of the other rules were these, some of

* Chiefly in *Dig.* xi., 7.

† It is worthy of notice that in the *Code Civil* (§ 1,156-1,164) there are rules only for the interpretation of conventions not for that of laws or wills. French law, like Roman, attempts to arrive at the intention of the contracting parties rather than at the meaning of the words used. The latter, however, must often be of great assistance towards the attainment of the former. In cases other than conventions the judge must decide as best he can, and cannot shelter himself from liability for denial of justice by urging the silence, obscurity, or insufficiency of the law. *Code Civil*, § 4.

‡ *Dig.* ii., 14, 38.

§ *Dig.* I., 17, 45.

Dig. ii., 15, 3, *pr.*

¶ *Dig.* ii., 2, 14, 28, *pr.*

** *Id.*, 31.

them perhaps equally applicable to interpretation of any kind. The intention (*voluntas*) of the contracting parties was to be considered rather than their words.* Any words might be used, as long as the intention could be gathered from them.† The truth of the matter (*rei veritas*) rather than the mere writing should be looked at.‡ The acts of the parties rather than the written words are the important points.§ Interpretation should be uniform.|| Where there is ambiguity a stipulation is to be so taken that the matter in question should be in safety.¶ Ambiguous expressions are to be interpretated against the *stipulator*.** The rule is the same as to *pacta*.†† No obligation can arise from impossibilities.‡‡ Error of description is of no moment when the subject matter is certain.§§ There are many instances in the *Digest* and *Code* of interpretations of particular words used in contracts. Thus, it was held that if a stipulation were made in this form, "Will you give ten or fifteen?" ten are owed; if in this form, "Will you give in a year or two years?" the debt is not due for two

* *Dig.* I., 16, 219. The example given is a lease by a municipality of *Ager vectigalis*; so that it should belong to the *heres* of the lessee. In this case the right of the *heres* might be transferred to a legatee.

† *Cod.* viii., 38, 10. ‡ *Cod.* iv., 22, 1. § *Id.*, 3 & 4.

|| *Dig.* xxxv., 2, 32, 2. This rule applies in the text only to praetorian stipulations, but no doubt it would have been held from its reasonableness applicable to other forms of contract. It occurs, curiously enough, in the middle of a commentary on the *Lex Falcidia*. "The stipulation being a form of contract to which all others were reducible, it is generally safe to infer that a rule primarily laid down as to stipulations is of general authority.

¶ *Dig.* xl., 1, 80.

** *Dig.* xxxiv., 5, 26. (This title (*De Rebus Dubiis*) occurring in the midst of the law of *legata*, and primarily referring to them, still contains several rules as to contract. It is a good example of the unscientific arrangement of the *Digest*.) *Dig.* xl., 1, 38, 18; so of *pacta*, *Dig.* I., 17, 172. It was the fault of the *stipulator* or *pactor* that the meaning was not more clear. *Dig.* xviii., 1, 21.

†† *Dig.* ii., 14, 39. ‡‡ *Impossibilium nulla obligatio est.* *Dig.* I., 17, 185.

§§ *Nihil facit error nominis quum de corpore constat.* *Dig.* xviii., 1, 9, 1.

years, for in a stipulation the smaller sum and the longer period are to govern the contract.*. This is in accordance with the rule above as to the ambiguity being against the *stipulator* and also with the rule in *De Diversis Regulis Juris* to the effect that *semper in obscuris quod minimum est sequimur*.† Another and rather curious instance is a contract to build a block of buildings (*insula*) in a town after the contractor's death. Such a contract, regarded by the older authorities as impossible, was by a Constitution of Justinian held to bind the *heredes* by importing a tacit mention of them into the contract.‡ In certain cases of *pacta* the law interpreted a tacit *hypotheca* or condition into the agreement.§ The number of cases in which a *hypotheca* was merely tacit or implied was very considerable. It attached, for instance, to all property of debtors to the *fiscus*, to the husband's property for restitution of *dos*,* to the *hereditas* for the benefit of legatees,** and to many other cases. An example of an implied condition was an agreement for a loan, with a proviso that as long as interest was paid, the principal was not to be demanded. If the return of the money was stipulated, without reference to the agreement as to return of the principal, the condition as to the latter was held to be implied.†† Some of the rules relating to the interpretation of wills were specially transferred to contract, by analogy (*exemplum*).†† In other matters they differed. §§

* *Dig.* xlv., 1, 109.

† *Dig.* 1., 17, 9.

‡ *Cod.* viii., 38, 15.

§ *Quia conventiones etiam tacite valent.* *Dig.* xiv., 4, *pr.*

|| *Dig.* xlix., 14, 46, 3.

¶ *Cod.* v., 13, 1, 1.

** *Cod.* vi., 43, 1.

†† *Dig.* ii., 14, 4.

†† As in *Cod.* iv., 38, 4, the analogy being between the sale of a mother's goods and the *Querela inofficiosi testamenti*. So in *Dig.* 1., 17, 17, it is said that the rule that in wills any time inserted is for the benefit of the heir applies to stipulations, the time in them being for the benefit of the promisor.

§§ For instance, in the example given in *Dig.* 1., 17, 18.

Wills.—The interpretation of wills (including that of bequests, whether *legata* or *fideicomissa*) was worked out with more minuteness than almost any other branch of Law. Books xxx.—xxxiv. of the *Digest* are entirely taken up with it, and there is considerable additional matter in Book vi. of the *Code*. All the great jurists touched the question, and the institutional writers contain more on the interpretation of bequests than on any other kind of interpretation.* No doubt one explanation of this fact is that the Romans were essentially a will-making people, and in the classical age of Roman law intestate succession must have been rare, unless where the testator was under some legal disability, or a will had been revoked or become inoperative. Hence the term *intestabilis*, originally denoting incapacity to make a will, came to signify moral defect.

In a will, Interpretation was allowed only in matters *extra testamentum*, for the solemnities of execution strict law was followed.† Where the words of a will were incapable of interpretation from unintelligibility or repugnancy, the will was not void, but the words were regarded as unwritten.‡ The most general rules of interpretation peculiar to wills were that the intention§ of a testator was to be interpreted liberally (*pleniū*), and that no one could attempt to supersede law by his will.¶ Other rules of importance were the

* See Gaius, ii., 241; *Inst.* ii., 20, 30.

† *Dig.* xxxv., 1, 16.

‡ *Dig.* xxxiv., 8, 2; xxxv., 1, 3; 1, 17, 73, and 188.

§ *Voluntas*, originally the intention of the testator (as in Modestinus' definition of a will, *Dig.* xxviii., 1, 1) has, in its English form of "will," come to mean the actual document in which the intention is manifested. The use of a word originally abstract as concrete is a peculiarity of English legal terminology, e.g., *deed*, obligation, contract.

¶ *Dig.* 1, 17, 12. An example is given in *Dig.* xxviii., 5, 67. If the words of a will were *Tithasus si in Capitolium ascenderit, heres esto*; *Tithasus heres esto*; the second nomination was to prevail as being the more liberal from having no condition attached to it.

¶ *Dig.* xxx., 55.

following:—Words were not to stand against an obvious intention,* but where there was no ambiguity, no question of intention was to be raised.† As to *legata*, a *legatum* is not lost by false description.‡ Where a sum or quantity is named twice over, the legatee takes the double benefit.§ So where the same amount is due from two different *heredes*.|| Even where a specific thing is left, each of the *heredes* must give it or its value.¶ All these rules are subject to the proviso of absence of a contrary intention. *Legata* are payable at once where no time or condition is fixed.**

It may be worth while to consider one or two of the more interesting cases at greater length. An appointment of Jesus Christ as *heres* was interpreted to be a gift for the benefit of the church at the place where the testator died.†† A *legatum* to an archangel or martyr without mention of any church, was a gift to any church in the place dedicated to such archangel or martyr; in the absence of any such church, then to the metropolitan church, and if no metropolitan church so dedicated existed, then to the church of the place.†† The most venerated and frequented church takes the gift in such a case; otherwise the poorest church in the place.§§ It is curious to find Homer called as an interpreting authority in *legata* as well as in contract. Papinian is of opinion that under the head of *supellex* silver

* *Dig.* xxxii., 69; *Cod.* vi., 13, 2.

† *Dig.* xxxii., 25, i.

‡ *Falsa demonstratione legatum non fierimi.* *Inst.* ii., 20, 30.

§ *Dig.* xxx., 34, 3.

| *Dig.* xxxi., 44, 1.

¶ *Dig.* xxx., 53, 2.

** *Dig.* xxxiv., 1, 1, *pr.*

†† *Cod.* i., 2, 26, *pr.* This was a change made by Christianity in the old pagan rule (to be found in Ulpian, *Fragm.* xxiii., 6), under which only certain deities could be nominated *heredes*. Of these only one was essentially Roman, Jupiter Tarpeius, the others were all of provincial reputation, such as Diana of Ephesus.

†† *Cod.* i., 2, 26, 1.

§§ *Id.*, 2.

bedsteads and candelabra are included, for Ulysses ornamented his wooden bedstead with gold and silver, and this was one of the signs by which Penelope recognised him.* *Legata* were always construed as far as possible in favour of freedom. For instance, the daughter of a slave manumitted by will was held to take at once under the general description of *filii* although, being born in a state of slavery, she could not have been a legitimate child.† An instance of liberal interpretation is afforded by a Constitution of Justinian's that where villages were left to the State by *fideicommissum* the gift was good, although the testator had declared his intention of defining their boundaries by a subsequent instrument, but died before doing so.‡ A case which is similar to a class which has given much trouble to English Judges was this. A testator had two slaves, Flaccus, a fuller, and Philonicus, a baker. If he leave Flaccus the baker to his wife, what happens? According to Javolenus, the first thing to be considered is the intention of the testator; if that be not clear (presumably by extrinsic evidence), evidence should be given as to the testator's knowledge of their names; if he knew their names, Flaccus was to pass by the gift, the error being in the trade; if the names were unknown to him, the baker would be the one bequeathed.§

A great many particular words are interpreted in the part of the *Digest* dealing with wills, others being relegated to the two titles in the fiftieth book. Among others the discussion on which runs to great length are *triticum*, *vinum*, *oleum*, *fundus instructus*, *instrumentum*, *peculium*, *penus*, *supellex*. All these have special Titles devoted to their consideration. A few instances will suffice for illustration. Wine does not properly include *zythum* (whisky?), or beer, or vinegar, but

* *Dig.* xxxiii., 10, 9, 1.

‡ *Cod.* vi., 25 8.

† *Dig.* xxxi., 88, 12.

§ *Dig.* xxxiv., 5, 28.

it may include them if the testator was in the habit of accounting them wine.* Old wine was what the testator considered such;† in the absence of evidence of his habit, it was all wine more than a year old.‡ Wine includes the vessels in which it was contained, such as *amphoræ*, but not *dolia* for storage.§ A gift of a library includes the books.|| *Fundus instructus* includes furniture, clothes, gold, silver,¶ slaves,** library and books,†† in fact practically everything on the property but a crop ready for sale or not for use on the estate.||| *Peculium* was subject to deductions of various kinds, among others for damage done to a fellow-slave.||| *Penus* included fodder for carriage horses .. as well as provisions for friends.¶¶ The interpretation of *supellex* is interesting as showing the necessary extension caused by the advance of civilisation. In the days of the Republic, *supellex* did not include furniture made of or inlaid with ivory, gold, silver, or gems, but only earthenware, wood, glass, or iron. But, says Celsus, *moribus civitatis et usu rerum appellationem ejus mutatam esse*,*** and by tacit interpretation, *supellex* came to include furniture of the more valuable kind. A very similar change in interpretation, made necessary by circumstances, occurred in England. In the time of Henry VII., glass windows were considered to belong to the executor, because the house was perfect without them.††† But in 41 Elizabeth, it was held that the heir should have them, for without glass it was no perfect house.†††† The progressive character of law so as to suit the changing

* *Dig.* xxxiii., 6, 9, *pr.*

† *Id.*, 10.

‡ *Id.*, 11.

§ *Id.*, 2, 15.

|| *Dig.* xxxii., 52, 7.

¶ *Dig.* xxxiii., 7, 12, 28.

** *Id.*, 35.

†† *Id.*, 34.

††† *Id.*, 80.

||| *Dig.* xxxiii., 8, 8, 2.

||| *Dig.* xxxiii., 9, 3, *pr.*

¶¶¶ *Id.*, 6. The legal meaning of *penus* is the subject of a Socratic dialogue by Aulus Gellius (iv., 1.), founded on lines of Lucilius dealing with a bequest of *penus*.

**** *Dig.* xxxiii., 10, 7, 1. ††† Amos on Fixtures, p. 86. †††† 4 *Rep.* 63b.

circumstances of the times has been several times recognised recently by English Judges.*

Numerous other single words, besides those already mentioned, are interpreted in the *Corpus Juris*. For instance, *cautio* may mean a simple promise as well as a *fidejussio*,† *iterum* may be used for *sapius*,‡ *scu* and *aut* may both be used as equivalents of *et*,§ the disjunctive, as often in English decisions,|| being construed conjunctively. The contrary, however, seems to have been the more usual case, as appears from the title *De Verborum Significatione*.¶ A good example is the words *super pecuniae tutelae sue*,** already mentioned. Paulus' opinion was that in spite of the disjunctive, a tutor could not be given separately from the money.††

Enough has now been said to shew in outline the way in which Interpretation was worked out in the different branches of Law composing the *Corpus Juris*. This article is, as far as the writer knows, the first attempt of the kind, however imperfect, as yet made in England, and he

* "In other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same in literary works." Erle, C.J., in *Jeffreys v. Boosey*, 4 House of Lords Cases, 866. The progressive interpretation of English equity is acknowledged by Lord Cottenham in *Walworth v. Holt*, 4 My. & Cr. 635, and by Jessel, M.R., in *Re Hallett's Estate*, 13 Ch. D. 710, and of public policy by Fry, L.J., in *Davies v. Davies*, 36 Ch. D. 306.

† *Cod.* vi., 38, 3. † *Dig.* ii., 13, 7, 1.

§ *Dig.* xxxiv., 2, 30; *Cod.* vi., 38, 4.

¶ In some cases English Courts have read "or" as "and," in others they have refused to do so. See for an example in the construction of a will, *Re Sanders's Trusts*, L.R. 1 Eq. 675, of a specification for a patent, *Simpson v. Holliday*, L.R. 1 H.L. 315.

Dig. I., 17, 28, 29, 53, 142.

*² The cases of the nouns following *super* are, it will be noticed, different from those used by Ulpian, *Reg.* xi., 14. This is perhaps a confirmation of the opinion that they were not contained in the original text of the XII. Tables.

112 *Dig. 1., 17, 53.*

will be more than satisfied if, like Virgil, he have shewn the road which some one more capable may travel with better result.

*Facesti come qui che va di notte
Che porta il lume dietro e se non giova,
Ma dopo se fa le persone dotte.**

JAMES WILLIAMS.

III.—FOREIGN MARITIME LAWS: III. SPAIN.

CODE OF COMMERCE.—BOOK III.

• TITLE II.

SECTION II.—(*Continued.*)

Of Commanders and Masters of Vessels.

ART. 612. The duties hereinafter mentioned are inherent in the post of captain.

- (1.) To have on board before undertaking a voyage an inventory in detail of the hull, engines, apparel, implements, spare stores, and other appurtenances of the ship; the Royal license, or license to navigate, the muster roll of the persons composing the crew and the shipping articles entered into with them, the list of passengers, the bill of health, the certificate of registration, which shews the ownership of the vessel and all charges upon her up to its date, the charter parties, or certified copies of them, the bills of lading or Custom House permits for the cargo, and the report of survey or examination by experts, if the survey has been held at the port of departure.
- (2.) To have on board a copy of this Code.
- (3.) To have three books, folded and stamped, with a note at the beginning of each, stating the number of

* Dante, *Purg.* xxii., 67.

pages that it contains, signed by the Maritime Authority, or failing it by other proper authority.

In the first book, which is called the log-book (*diario de navegación*) will be noted day by day the state of the weather, the winds that prevail, the courses steered, the gear used, the power indicated by the engines when they are employed, the distances run, the manœuvres executed, and other incidents of the voyage; there will further be noted damages sustained by the vessel in its hull, engines, apparel and furniture from whatever cause they arise; as also deterioration and damage that the cargo experiences, and the things jettisoned and the necessity for jettison, if it takes place. And in cases of a serious decision, which requires a council of the officers of the ship, or even of the crew and passengers to be assembled or held, the votes taken will be noted. To make up these notes the deck log and engineers' rough log kept by the engineers will be used.

In the second book, called the account book (*de contabilidad*) will be entered all the receipts and payments on account of the vessel, noting with each entry from what the receipt arises, and whether the disbursement is for stores, repairs, purchase of spare spars or goods, provisions, fuel, fitting out, wages, or other things of whatsoever nature they may be. Moreover, a list of all the members of the crew will be inserted, shewing their residences, wages and salaries, and what they receive on account, whether directly or as allotments drawn by their families.

In the third book, called the cargo book (*de cargamentos*) will be noted the shipment and discharge of all merchandise, with their marks and packages, the names of the shippers and consignees, ports of loading and discharge, and freights earned. In the same book will be entered the names of passengers, and the places where they join, the numbers of their baggage, and the amount of their passage money.

- (4.) If the shippers and passengers require it the officers of the ship and two experts will survey the ship before she receives her loading, to assure themselves that she is staunch, that her apparel and machinery are in good condition, and that she has the fittings necessary for seaworthiness, and the captain will keep a certificate of that report of survey signed by all who made it, to save his responsibility. The experts will be nominated, one by the captain of the ship and the other by those who required the survey, and if they disagree a third will be nominated by the Maritime Authority of the port.
- (5.) To remain constantly in the ship with his crew whilst receiving cargo and to watch its stowage carefully; not to allow any merchandise or articles of a dangerous character to be shipped, such as inflammable or explosive substances, without the precautions which are advisable for packing, moving and isolating them, not to permit any cargo to be put on deck which from its position, size or weight interferes with the working of the ship and may cause danger to it, and in case the nature of the merchandise, the peculiar character of the voyage and especially the favourable season in which it is undertaken, allow any cargo to be carried on deck, he must listen to the opinion of the ship's officers and obtain the consent of the shippers and ship-owner.
- (6.) To take a local pilot at the expense of the ship in all cases where it is necessary for navigation and more particularly when he has to go into a port, channel or river, or to make a roadstead or anchorage which neither he nor the officers or crew know.
- (7.) To be on deck when making the land, and to take charge on going in or out of ports, channels, bays

and rivers unless he has on board a local pilot who is doing his duty, and not to be away from the ship for a night unless for some special reason or on duty.

- (8.) To present himself on arrival at a port of refuge, if in Spain to the Maritime Authority, if abroad to the Spanish Consul, within twenty-four hours, and make a deposition of the name, port of registry and port of departure of the ship, what cargo it has and the cause of putting in, which declaration will be viséed by the Authority or Consul, if on examination it appears to be right, and they will then give a suitable certificate to prove his putting in and the reasons which caused it. Failing a Maritime Authority or a Consul, the deposition must be made before the Authority of the place.
- (9.) To take the necessary steps before the proper authority to have entered on the Mercantile Register in which the ship is inscribed, debts contracted in conformity with Article 583.
- (10.) To carefully collect and preserve all papers and effects of any member of the crew who dies on board the ship, drawing up a detailed inventory with the assistance of passengers, or, if there are none, that of the crew as witnesses.
- (11.) To regulate his conduct by the rules and orders contained in the shipowner's instructions, being held responsible for what he does contrary to them.
- (12.) To report to the shipowner when the vessel puts in, the reason of his arrival, taking advantage of the facilities that semaphores, telegraph, and mails present as the case may be, to inform him of cargo received, giving the names and residence of the shippers, of freights earned and of sums borrowed on bottomry, to advise him of his departure, and of whatever affairs and news concern him.

(13.) To observe the regulations as to placing lights and the measures to be taken to avoid collisions.

(14.) To remain on board when the vessel is in danger until the last hope of saving the ship is lost, and before abandoning her, to take counsel with the ship's officers, acting as the majority decide, and if obliged to take to the boats to manage before everything else to take the (ship's) books and papers, then articles of the greatest value, being bound to prove in case of the loss of the books and papers, that he did his utmost to preserve them.

(15.) In case of shipwreck to enter a formal protest in the first port at which he arrives, before the proper authority or Spanish Consul within 24 hours, stating in it all the incidents of the shipwreck, in conformity with section 8 of this Article.

(16.) To fulfil the duties which the Laws and Regulations as to navigation, customs duties, health, and other matters impose on him.

(1.) B. Bk. II., 17, F. 226, G. 480, H. 357, I. 500, 503, N. 11, P. 499, 504, R. 892, Sw. 28, E. 41, M. & P. 139, 143.

(2.) H. 357, N. 25, R. 906, E. 41.

(3.) B. Bk. II., 15, F. 221, G. 486, H. 358 diff., I. 500, N. 19, P. 499-503, R. 925, 927, log kept by mate, Sw. 33, 291, E. 38, 39, 41, M. & P. 133, 141, 142.

(4.) B. Bk. II., 16, F. 225, G. 480, H. 347, I. 502, M.M.C. Ch. VII., P. 505, R. 892, 1015, 1016, E. 40.

(5.) B. Bk. II., 20, F. 229, G. 484, H. 346, 348, I. 497, 498, P. 508 (1), R. 901, E. 44, M. & P. 134.

(6.) H. 363, I. 504, N. 18, P. 508 (5), R. 908, 909, 11. 42, M. & P. 137.

(7.) B. Bk. II., 18, F. 227, I. 504, E. 12.

(8.) B. Bk. II., 35, F. 245, G. 490-492, H. 383, I. 516-518, N. 20, P. 506, 508 (9), R. 912, Sw. 37, 39, E. 49, 60.

(9.) B. Bk. II., 24, F. 234, G. 497, 498, 503 diff., H. 372, I. 509, 591, E. 39.

(10.) G. (1872), 52, H. 430, I. M.M.C. 98, 99, M. & P. 235, 236.

(11.) R. 887.

(12.) B. Bk. II., 25, F. 235, G. 503, H. 360, P. 508 (11), Sw. 48, M. & P. 139.

(13.) I. M.M.C. 110, Sw. 171, M.S.A., 1873, § 17.

(14.) B. Bk. II., 31, F. 241, H. 362, I. M.M.C. 111, N. 82, P. 508 (4), (7), R. 895, 898, Sw. 27, 176, 289, E. 56.

(15.) B. Bk. II., 36, F. 246, G. 490, 526, H. 383, 384, I. 516, E. 61.

(16.) G. 492, N. 14, M. & P. 31-134.

613. A captain who sails a ship on shares or thirds cannot do business on his own account, and, if he does, the profits arising belong to the other persons interested in the ship, and the losses are sustained by himself.

• B. Bk. II., 29, 30, F. 239, 240, G. 514, H. 353, 390, I. 515, N. 12 diff., P. 520, E. 54, M. & P. 122.

614. A captain who has undertaken a voyage and does not carry out his undertaking, unless prevented by accident or insuperable difficulty, will indemnify all losses arising from that cause without prejudice to Criminal proceedings that may be applicable to the case.

B. Bk. II., 28, F. 238, G. 483, 521, H. 354, I. 514, N. 9, P. 508 (4), Sw. 27, E. 53.

615. A captain cannot without the consent of the owner appoint another person in his place, and if he does so he remains responsible for all the acts of his substitute, and subject to the liabilities detailed in the preceding Article, and both of them may be dismissed by the owner.

G. 483, H. 356, I. M.M.C. 108, N. 27, P. 515, R. 898, Sw. 26, 27.

616. If the provisions or fuel of the ship are used up before reaching her port of destination, the captain may, after taking counsel with his officers, take steps to put into the nearest port to obtain one or the other, but if there are persons on board who have provisions of their own he may compel them to give them up for the general use of all on board on payment of their value at the time, or, at the latest, at the first port which they reach.

B. Bk. II., 39, F. 249, H. 374, I. 508, M.M.C. 94, 95, N. 15, R. 912, E. 64.

617. The captain cannot borrow money on bottomry on the cargo, and if he does so the contract will be of no effect.

Neither can he borrow for his private affairs on the ship except on that portion of which he is owner, and if there has been no previous bottomry loan on the whole ship,

and no other charge on the vessel is in existence. If he desires to borrow he must, of necessity, state what his share in the vessel is.

In case of a breach of this Article, the money borrowed with interest and costs will be chargeable on the captain's private property, and the owner may dismiss him.

B. Bk. II., 24, 26, F. 234, 321, G. 497, 504, 507-510, H. 372 diff., 375, I. 509, 591, N. 97, P. 511, R. 912, 1058-1061, Sw. 127, 128, E. 49 and Tit. X., M. & P. 155-158.

618. The captain will be civilly responsible to the ship-owner, and the latter to third parties who have contracted with him:—

- (1.) For all damages that the ship or cargo sustain from his negligence, or want of skill, if there has been actual delict or default it will be settled by the Penal Code.
- (2.) For pilferings and thefts committed by the crew, saving his right to recover over from the guilty persons.
- (3.) For losses, fines, and confiscations imposed for breaches of the Laws and Regulations of Customs, Police, Health, and Navigation.
- (4.) For damages and injuries caused by brawls arising in the ship, or by offences committed by the crew in the service or defence of the same, unless he proves that he duly exercised his authority to the utmost limit to prevent and avoid them.
- (5.) For those arising from the improper exercise of the functions, and default in fulfilling the corresponding duties in conformity with Articles 610 and 612.
- (6.) For those caused by taking a course different from the right one, or having, in the judgment of the officers of the ship in consultation, assisted by the shippers and super-cargoes on board, deviated without good cause.

There is no exemption from this responsibility for any reason whatever. . .

- (7.) For those which result from going into a port other than that to which he is bound, save in the cases and with the formalities of which Art. 612 treats.
- (8.) For those which result from a neglect to observe the regulations for carrying lights and for manœuvring to avoid collisions.

B. Bk. II., 12, 21, F. 221, 230, G. 478, 479, 736, H. 345, 346, 349, 534, 535, I. 496, 497, N. 42, 43, 78, 79, P. 496, 497, R. 890, 894, 915, 817-921, Sw. 40, 44, 49, 74, E. 30, 35, 36, M. & P. 138, 154, 178, M.S.A., 1862, §§ 27, 28.

619. The captain is responsible for the cargo from the time of its delivery on the wharf or alongside in the loading port until its delivery on the shore or wharf of the port of discharge, unless it has been otherwise expressly agreed.

B. Bk. II., 13, F. 222, G. 481, 504, 607, 631, H. 345, 349-351, I. 498, N. 52-55, P. 497, R. 1018, Sw. 49, 81, 104, E. 36, M. & P. 135, 136, 153, 321, 559.

620. The captain will not be responsible for unavoidable accidents to ship or cargo, but he will always be liable for those occasioned by his own defaults, notwithstanding any agreement to the contrary.

Neither will the captain be personally liable for debts incurred for repairing, refitting or provisioning the ship, which fall upon the owner unless he has pledged his personal credit or put his name to Bills of Exchange.

B. Bk. II., 21, F. 230, G. 496, 502, 503, 607, 608, H. 345, I. 496, N. 54, P. 496, R. 1026, Sw. 42, 44, 49, 103, E. 45, M. & P. 136, 88, 157, 155, 620.

There appears to be a divergence on the law laid down in the first clause of this article, between England and some at all events of the States of the American Union. *In re Missouri Steamship Co.*, 42 Ch. D. 321.

621. A captain who borrows money on the hull, engines, apparel, or furniture of the ship, or pledges or sells goods or provisions, except in the cases and with the formalities laid down in this Code, will be liable for the capital, with interest and costs, and will make good losses occasioned thereby.

If guilty of fraud in his accounts he will repay the amount of his fraud, and will remain subject to the dispositions of the Penal Code.

B. Bk. II., 26, F. 236, H. 375, I. 512, 591, 595, N. 108, R. 914, 1060, Sw. 42, E. 161.

622. If whilst on a voyage the captain receives notice of privateers or ships of war inimical to his flag, he must make for the nearest neutral port, and send a report to his owners or shippers, and wait for an opportunity of sailing under convoy, or till the danger is past, or till he receives definite orders from the shipowner or shippers.

H. 364, Sw. 45, E. 97.

623. If he is attacked by a pirate (*corsarco*) and after having done what he could to avoid the meeting and to resist the surrender of articles belonging to the ship or cargo, they are taken by force, or he is compelled to deliver them, he will make a formal entry in his cargo book and prove it before the proper tribunal in the first port he arrives at.

On proof of compulsion (*fuerza mayor*) he will be held free from liability.

Cf. R. 1056 which provides for victory only. Sw. 111., no freight payable in such case, E. 45, 121, 122, M. & P. 136.

624. When a captain meets with bad weather, or has reason to believe that the cargo has sustained damage or average, he shall enter a protest about it before the proper authority in the first port he arrives at within 24 hours of his arrival, and shall extend it within the same time immediately he reaches his port of destination, proceeding then to the proof of the facts without opening his hatches until they are verified. The captain will proceed in the same way if, after the ship is lost, he is saved alone, or with a portion of his crew, in which case he will present himself before the nearest Authority and make a sworn report of the facts.

The Authority or the Consul, if abroad, will verify the facts stated, taking a sworn declaration from the members of the crew and passengers who are saved, and taking

other measures to get at the facts of the case, considering the evidence deduced from entries in the official log and chief officer's book, and will deliver to the captain the original entry stamped and with the pages numbered, with a note of the folios (number of words), which ought to be in red ink, to be produced to the Judge or Court at the port of destination.

The deposition of the captain will be believed if it agrees with those of the crew and passengers; if it disagrees it will stand so far as it is in conformity with them, unless the contrary is proved.

B. Bk. II., 32, 36, 37, F. 242, 246, 247, G. 490-491, H. 383, 384, I. 516, M.M.C. Ch. XI., N. 20-24, P. 506, R. 1090, 1091, Sw. 37, 38.

625. The captain is free from personal responsibility when, after reaching his port of destination, he has obtained the necessary permits from the Health officers and Customs, and complied with the other formalities that the Government Regulations require, and has delivered the cargo in full to the consignees, and, if the question concerns the ship, has delivered it with its apparel and freight to the shipowner.

If, through the absence of the consignee, or because no lawful holder of bill of lading appears, the captain does not know to whom he ought lawfully to deliver the cargo, he must place it at the disposal of the Judge or Court or Authority corresponding thereto to the end that it may be decided what is best to do for its warehousing, preservation, and watching.

B. Bk. II., 232, F. 435, G. 629, 648, II. 489, 495-497, 746, I. 557, N. 63-65, P. 539, 560, R. 1027, 1036, 1037, Sw. 98, 115, E. 124.

SECTION III.

Ship's Officers and Crews.

626. To be a mate (*piloto*) it is necessary

(1.) To fulfil the conditions required by the Laws and Regulations relating to seamanship and navigation.

(2.) Not be under any incapacity as laid down by those Regulations for the performance of his duties.

I. M.M.C. 67, 68, R. 853, MacL. 188.

627. The mate, as second in command of the ship, will until the shipowner makes other arrangements take the place of the captain in case of his absence, sickness or death, and at such time will assume all his functions, duties and responsibilities.

G. 483 (1872), 53, H. 356, I. M.M.C. 108, N. 13, 27, R. 898, 925, 928, Sw. 54, MacL. 159.

628. The mate must be provided with charts of the seas in which he is going to sail, and with the usual tables and astronomical instruments necessary for the discharge of his duty, being responsible for accident caused by his omission in this respect.

H. 397 (6), 406-409, N. 19, 39.

629. The mate will in particular keep and himself write up a book, paged and stamped on all its leaves, called the log-book (*Cuaderno de bitácora*) with a note at its commencement, signed by the proper authority, stating the number of pages it contains, and in it will day by day enter the distances run, courses steered, the variation of the compass, the leeway, the direction and force of the wind, the state of the weather and sea, the stores consumed, the latitude and longitude observed, the number of boilers in use, the pressure of steam, number of revolutions, and under the heading of incidents (*Accidentes*) the manœuvres executed, ships fallen in with, and all events and accidents which happen during the voyage.

G. 486, H. 359, N. 19, 39, R. 927.

630. The mate and captain should agree on any change of course for the better navigation of the vessel. If the latter objects the mate will explain his reasons in the presence of the other deck officers ; if, notwithstanding, the captain retains his opposite opinion, the mate will make proper protest, signed by him and another of the officers in the

official log, and will obey the captain who will alone be responsible for the consequences of his opinion.

G. 485, H. 367, N. 19, 39.

631. The mate will be answerable for all damages caused to the ship and cargo by his negligence or want of skill, without prejudice to the Criminal liability which may exist if he is guilty of actual fault or default.

G. 736, H. 397 (12) (13), 405, 452, 535, N. 78, 79, Sw. 54.

632. The duties of the boatswain (bos'un) (*contramaestre*) are as follows :—

- (1.) To look after the preservation of the hull and rigging of the ship, and take charge of the stores and implements which compose his store account, notifying to the captain necessary repairs and the replacing of goods and implements which were worn out and expended.
- (2.) To see that the cargo is properly trimmed, so that the ship may sail to the best advantage.
- (3.) To keep order and discipline, and see to the proper discharge of duty by the crew, seeking proper orders and instructions from the captain, and giving him timely notice of any circumstances in which the intervention of his authority is necessary.
- (4.) To point out to each seaman the work he has to do on board, in conformity with the orders he has received, and to see that it is done properly and fairly distributed.
- (5.) To make out an inventory of the rigging and furniture of the ship if she is dismantled, unless the shipowner has made other arrangements.

The following are the regulations to be observed in respect to the engineers :—

- (1.) To enable a person to ship as a naval engineer forming part of the crew of a merchant ship, it is necessary to fulfil the conditions required by the

Laws and Regulations, and not be under any incapacity, as laid down by those Regulations, for the performance of his duties. Engineers are considered as officers of the ship, but exercise no command or interference, except in that which relates to the engines.

- (2.) When there are two or more engineers carried on board a vessel, one of them is the chief engineer, and has under his orders the other engineers and all the engine-room hands ; he will also have under his charge the engine, spare pieces (of machinery), the instruments and tools connected with them, fuel, oil, and tallow, and whatever else there is on board in the engineer's department.
- (3.) He will maintain the engines and boilers in a good state of preservation and cleanliness, and take proper steps to enable them at all times to work regularly, being responsible for accidents and damages caused by his negligence or want of skill to the engines, ship or cargo, without prejudice to the Criminal liability which may exist if it is proved to have been the result of his actual fault or default.
- (4.) He must not make any alteration in the engine, nor proceed to remedy defects that he has noticed in it, nor alter its regular speed without the authority of the captain, to whom, if he opposes what is stated, he will explain the matter suitably in the presence of the other engineers or officers, and if in spite of this the captain persists in his opposition, the chief engineer will make a proper protest, signed, in the engineer's log, and will obey the captain, who alone will be responsible for the consequences of his resolution.
- (5.) He must report to the captain every accident that happens to the engine, and give him notice when he

has to stop the engines for a time, or when any accident happens in his department of which immediate notice ought to be given to the captain, and he must frequently inform him of the consumption of fuel and oil stores.

- (6.) He must keep a book or register called the "Engineer's Log" (*Cuaderno de máquinas*), in which he will note all matters concerning the working of the engines, as for example, the number of furnaces alight, the pressure of steam in the boilers and cylinders, the vacuum in the condenser, the temperatures, degree of saturation of the water in the boilers, the consumption of fuel and oil stores, and under the heading of particular circumstances (*Ocurrencias notables*) the damages and deteriorations which take place in the engines and boilers, the causes producing them, and measures taken to repair them; further, he will state, taking the facts from the ship's log, the force and character of the wind, the sail set, and progress of the ship.

I. M.M.C. 66, 69.

633. The boatswain will take command of the ship in case of necessity or the incapability of the captain and mate, assuming in such case the corresponding functions and liabilities.

I. M.M.C. 108.

634. The captain can make up the crew of his ship of such numbers of men as seem fit to him, and, failing Spanish seamen, may ship foreigners domiciled in the country, unless their number exceeds one-fifth part of the crew. When in foreign ports the captain cannot find a sufficient number of national hands, he may, with the consent of the Consul or Maritime Authorities, make up his crew with foreigners. Contracts entered into by the captain with the members of his crew and others forming

part of the ship's company, and those to which reference is made in Art. 612, must be in writing, entered in the Ship's Account Book without the intervention of a notary or clerk, signed by the contracting parties and vised by the Maritime Authority if entered into in Spanish dominions, or by the Spanish Consul or Consular Agent if abroad; setting out all the duties that each undertakes, and all the rights he acquires, the said Authorities taking care that these duties and rights are clearly and decidedly defined, so as to leave no room for doubts and disputes. The captain will read to the crew the Articles of this Code that concern them, making a note of the reading in the same document.

The book, if kept as laid down in Art. 612, and having no sign of alteration in its sheets, will be valid evidence in questions arising between the captain and crew on the contracts entered into between them, and as to the sums paid on account of the same.

Each member of the crew may require from the captain a copy signed by him, both of the contract itself, and of the payments made under it as shewn in the book.

B. Bk. II., 14, 47, F. 223, 250, G. 480, 495 (1872), 10-14, 39, II. 343, 394-398, I. 499, 521-523, M.M.C. 71-73, N. 10, 28, P. 498, R. 935, 937, 938, 944, 945, Sw. 29, 51, E. 37, 65, M. & P. 128, 727.

635. A seaman who is engaged for service in a ship cannot annul the contract nor refuse to perform it unless some legitimate cause has supervened.

Neither can he transfer his services from one ship to another without the written permission of the captain of the ship he is serving in. If, not having got such permission, a seaman who is engaged to one ship engages himself to another, the second contract is null, and the captain has the option of either compelling him to carry out the service in which he first engaged, or finding a substitute at his expense. Further, he will forfeit the wages earned under

his first employment for the benefit of the ship in which he first engaged.

A captain who, when aware that a seaman is engaged to another vessel, makes a fresh contract without getting the permission mentioned in the preceding paragraphs will be liable subsidiarily to the captain of the vessel to which the seaman belonged, for the part of the indemnity mentioned in the third paragraph which the latter cannot satisfy.

G. (1872), 8, 15, 28, 29, H. 400, 401, N. 29, 108, 111, R. 948, 949, Sw. 29, 51, 52, 70, 287, 293.

636. When the term for which a seamen is engaged is not agreed, he cannot be discharged until the end of the voyage out and home to the port where he shipped.

G. 1872 (36), II. 344, I. 525, N. 29, Sw. 55.

637. Neither can a captain discharge a seaman during the term of his engagement except for just cause. The following are deemed such.

- (1.) Commission of an offence which is subversive of discipline on board the ship.
- (2.) Repeated insubordination, breaches of discipline or duty.
- (3.) Want of skill or repeated neglect in performance of his appointed duties.
- (4.) Habitual drunkenness.
- (5.) Any accident which incapacitates the seaman from doing the work with which he is entrusted, saving the provisions of Art. 644.
- (6.) Desertion. Nevertheless, the captain may, before the commencement of the voyage and without giving any reason, refuse to receive a seaman who is engaged and may leave him ashore, in which case he must pay his wages as if he did duty. This compensation will be charged on the whole adventure if the captain has acted from motives of prudence and in the interest of the safety and prosecution of it, otherwise

it will be charged against the captain himself. When the voyage has commenced, during its continuance and until its termination, the captain may not abandon any man either ashore or at sea, unless when charged with a crime, he imprisons him and gives him over to the proper authority in the first port he touches at, in which case the captain must do so.

G. (1872), 57-59, H. 314, 397 (7) (11), 436, 437, I. 542, M.M.C. 74, 75, N. 120, P. 534, R. 994, 995, Sw. 56-60, 68, 69, E. 85, 86.

638. If, after the crew are engaged, either before or after the ship goes to sea, the voyage is given up by the will of the owner or charterers, or if for such reason the ship is ordered on a different voyage from that for which the crew shipped, they will receive compensation for the rescission of the contract as the case may be, that is to say:—

- (1.) If the abandonment of the voyage is decided on before the ship leaves port, each seaman will receive one month's pay over and above what he is entitled to according to his engagement for services rendered on board the ship prior to the abandonment.
- (2.) If engaged for a fixed sum for the whole voyage (by the run) each will receive the proportion of the said sum that the said month and days bear to the probable length of the voyage, as estimated by experts, as laid down in the Code of Civil Procedure, and if the intended voyage was so short that its length is approximately a month, the compensation will be fixed at fifteen days, deducting in all cases advances.
- (3.) If the voyage is given up after the vessel has sailed, the men paid in a lump sum for the voyage earn the whole of their pay as if the voyage was completed, and those paid by the month will receive a sum corresponding to the time they have been on board, and that which it would take them to get

back to their port of final destination. The captain must, moreover, provide them, in whatever way paid, with passages back to the said port or to the ship's home port at their option.

(4.) If the owner or charterers of the ship decide on a voyage different from that agreed upon, and the crew do not accept the alteration, they are entitled to one-half of that laid down in (1) as compensation over and above what is due to them for the portions of months elapsed since their engagement.

If they accept the alteration, and the voyage, on account of its increased length or other reasons, gives cause for an increase of pay, it will be privately arranged, or in case of disagreement, by friendly arbitration. If the voyage is shortened by being to a nearer place there will not on that account be any reduction in the agreed pay.

If the abandonment or alteration of the voyage proceeds from the shippers or charterers, the owner retains his right to recover just compensation.

B. Bk. II., 48, F. 252, G. (1872) 57-67, II. 411, 412, 416, I. 529, N. 31, P. 522, 523, R. 953, S. 56-60, E. 67, 70, 71, M. & P. 138 N. (h).

639. If the abandonment of the voyage proceeds from good cause independent of the will of owner and shippers, and the ship has not sailed from port, the members of the crew have no other right than that of receiving the wages earned up to the day of the abandonment.

B. Bk. II., 49, F. 253, G. 1872 (56), H. 413, 414, I. 530, N. 31, P. 524, 525, Sw. 56-60, E. 68, 69.

640. "Good causes" for the abandonment of the voyage are—

- (1.) Declaration of war or interdiction of trade with the Power to whose territory the ship is bound.
- (2.) Blockade of the port of destination, or a pestilence breaking out after the agreement is made.
- (3.) Prohibition to discharge in the said port the goods composing the cargo of the ship.

(4.) The arrest or embargo of the ship by order of the Government, or other cause independent of the will of the owner.

(5.) The unseaworthiness of the ship.

G. (1872), 56, H. 413, 414, I. 530, N. 31, P. 524, 545, Sw. 56-60, E. 45, 69.

641. If, after the commencement of the voyage, any of the first three causes mentioned in the last Article happens, the seamen will be paid in the port which the captain thinks fit to put into for the benefit of ship and cargo, according to the time they have served on board ; but if the ship has to prosecute her voyage, the captain and crew can mutually demand the fulfilment of the contract.

In case the fourth happens, half-pay will continue to be paid to the crew if engaged by the month ; but if the detention exceeds three months the employment is deemed at an end, giving to the crew the sums they would have received according to the contract on the termination of the voyage, and if the engagement is for a lump sum for the voyage, it must be completed in the terms of the contract.

In the fifth case the crew have no further right than to receive the wages earned ; but if the unseaworthiness of the ship results from the negligence or want of skill of the captain, engineer, or mate, they will compensate the crew for losses sustained, always retaining any Criminal liability they may be under.

B. Bk. II., 50, 54, F. 254, 258, G. (1872), 56-67, H. 414, I. 531, N. 31, P. 524, 525, Sw. 56-60, E. 68, 68.

642. Where the crew are engaged on shares (sail on shares), the abandonment, delay or greater extension of the voyage confers no right beyond the proportional part in the compensation given to the adventure by the persons responsible for the matter.

B. Book II., 53, F. 257, G. 1872 (69), H. 416, I. 534, P. 527, E. 72.

643. If ship and cargo are a total loss by capture or shipwreck, all claims are deemed to be extinguished,

whether on behalf of the crew to recover any wages or by the shipowner for the repayment of advances made.

If any part of ship or cargo, or of both, are saved, the crew paid by wages, including the captain, preserve their claim against the property salved and its proceeds, whether remains of the ship or payment of freights for cargo salved. But sailors who sail on shares in freight have no claim against salvage of the hull, but only against the portion of freight salved. If they have worked to recover the remains of the shipwrecked vessel, they will be awarded, out of the value of the salved property, a reward proportional to the efforts made and risks encountered to carry out the salvage.

Bk. II., 54, 56 diff., F. 258, 259, G. 1872 (56) diff., H. 418-421, I. 535, 536, N. 33 diff., P. 528, Sw. 59 diff., E. 73-76.

644. A seaman who falls sick does not lose his right to wages during the voyage if the sickness is not the result of his own fault. In all cases the expenses of nursing and curing are at the charge of the ship, on terms of repayment.

If the illness proceeds from injuries sustained on duty or in defending the ship, the seaman is nursed and cured at the expense of the adventure, deducting the expenses of nursing and treating from the freight in the first instance.

B. Bk. II., 57-59, F. 262-264, G. 1872 (48, 49), H. 423-428, I. 537, 538, N. 32, P. 529, 530, R. 990, 991, Sw. 64, 65, E. 77-79, M. & P. 178 n. (o), 209, 221.

645. If a seaman dies during the voyage, his earnings not received by him due at the time of his decease on the contract go to his heirs, that is to say—

If he has died a natural death, and is paid by wages, there is payable the amount of his wages earned up to the date of his decease. If paid by the voyage, then if the seaman dies on the outward voyage the half, and if on the homeward voyage the whole of the stipulated sum.

And if he is paid on shares, and the death takes place after the voyage is commenced, the share pertaining to the

seaman goes to his heirs, but if he dies before the ship sails, the heirs have no right to claim anything.

If the death is caused by defending the ship, the seaman is deemed to be alive, and on the conclusion of the voyage the whole of the wages, or the whole share of profits which correspond to it, goes to his heirs in the same way as to others of his rating. In the same way a seaman captured whilst defending his ship is deemed to be present to take the same advantages as the rest of the crew, but if taken prisoner by reason of his own carelessness, or other cause having no relation to his duty, he will only receive his wages earned up to the date of his being taken prisoner.

B. Bk. II., 60, F. 265, G. (1872) 51, H. 431, I. 539, 540, N. 31, P. 531, R. 993, Sw. 66, E. 80, M. & P. 208, 221.

646. The ship, with its engines, apparel, furniture, and freight, is liable for the pay earned by the crew engaged on regular wages or by the voyage, which has to be settled and paid between the end of one voyage and the beginning of another.

When a fresh voyage is commenced, debts of this class proceeding from a previous voyage lose their precedence.

B. Bk. II., 4 (7), 63, F. 191 (6), 271, G. (1872), 68, H. 451, 741, I. 673 (3), 675 (7), N. 37, P. 578 (6), 582 (2), S. 275, E. 5 (6), 89, M. & P. 86, 241.

647. The officers and crew are deemed to be free from all engagements if they think fit, in the following cases:—

(1.) If before the voyage begins the captain alters it, or if a naval war breaks out with the Nation to whose country the ship is bound.

(2.) If an epidemic malady breaks out and is officially declared to exist in the port of destination.

(3.) If there is a change in the ownership or captain of the ship.

G. (1872), 61 diff., H. 440, N. 31, R. 952, 953, Sw. 70, E. 88, M. & P. 179.

648. By the "Ship's Company" (*dotación*) of a ship is understood the assembly of all persons shipped, from the captain to the ship's boy, who are needed for its conduct,

manceuvres and duties, and so there are comprehended in the Ship's Company, the crew proper, mates, engineers, firemen, and others not specified who perform duties on board, but not passengers or other persons that the ship carries.

• B. Bk. II., 64, F. 272, G. 445 (1872), 3, I. 521, P. 516, Sw. 72, M. & P. 162.

F. W. RAIKES.

IV.—CURRENT NOTES ON INTERNATIONAL LAW.

Privilege of Ambassadors.

A CURIOUS point as to the extent of the *jus legationis* was very recently decided by Mathew, J., in an action brought by Sir Halliday Macartney, the English Secretary to the Chinese Legation, and a British subject, to recover money paid under protest to get rid of a distress.*

Sec. 190 of 35 Geo. III., c. 73, absolves from payment of local rates "any ambassador, envoy, resident agent, or other public minister of any foreign Prince or State, or the servant of such ambassador, &c., or any other person not liable by law to pay such rate or assessment."

It is so unusual for a member of an Embassy to be a subject of the State to which the Minister is accredited, that the authorities are by no means clear as to the applicability of the ordinary principle of privilege in such cases.

Wheaton,† citing Martens, *Manuel Diplomatique*, Ch. 3, § 23, says that the Diplomatic Agent would "continue still subject to the local jurisdiction," though the learned Judge in the case under consideration cites his work as suggesting that "the privilege of the Envoy to exemption from the civil jurisdiction of his own country is not lost when there

* *Macartney v. Garbutt*, L.R. 24 Q.B.D. 368.

† Ed. by Boyd. London. 1890. Par. 225, p. 327.

has been no express condition to the contrary at the time when the member of the Embassy is received by his own Government."

Whatever may have been Wheaton's variation in opinion, however, it seems tolerably clear that the proposition last mentioned represents the view of the chief authorities who have dealt at all definitely with the question.

It is true that so recent and distinguished a writer as Mr. Hall, in a note in the last edition of his valuable work on International Law,* asserts without qualification that when "a subject is accepted by a State as the representative of a foreign country his character as a subject is effaced in that of the diplomat." It is probable that Mr. Hall, if he had examined the question in greater detail would have agreed with Sir Robert Phillimore's enunciation of the rules applicable.† Mr. Justice Mathew, apparently relying mainly on Phillimore and the earlier authorities cited by him,‡ came to what seems to be the only reasonable conclusion, *viz.*, that as Sir Halliday Macartney had been received by our Government without any reservations or conditions whatsoever, it was to be tacitly implied that he was recognised to possess the full and complete *jus legationis*, and therefore came within the scope and privilege of the Statute.

* * *

New Extradition Treaties.

Within the last few months negotiations have been going on between the United States and Great Britain and the United States and Russia for new Treaties in the matter of Extradition. It has long been a notorious fact that the

* London. 1890. p. 174.

† *Commentaries on International Law*, Vol. II., par. cxxxv. London. 3rd Ed. 1882.

‡ Bynkershoek, *De Foro Legatorum*. Lugd. Bat. 1721. cap. II., and Calvo, *Droit International*. Paris. (3rd Ed. 1880.) I. 7, 404.

Ashburton Treaty of 1842 is altogether inadequate to satisfy the requirements of the present day as between ourselves and the United States. The new Treaty is very much more exhaustive in the list of offences which it would make Extradition crimes. It has at length received the formal ratification of the Senate, having been some time ago settled by the Plenipotentiaries of the respective Governments, Mr. Blaine and Sir Julian Pauncefote.

The proposed Treaty would add to the former meagre list of Extradition crimes the following:—1. Manslaughter; 2. Counterfeiting money or uttering the same; 3. Embezzlement, larceny, receiving stolen goods and obtaining money by false pretences; 4. Fraud by bailee, trustee, etc.; 5. Perjury or subornation of perjury; 6. Rape, abduction, and kidnapping; 7. Burglary and housebreaking; 8. Piracy by the Law of Nations; 9. Mutiny or conspiracy to mutiny, and assault on board ship with intent to do grievous bodily harm; 10. Crimes against the laws of both countries for the suppression of slavery and slave trading.

The most noteworthy point in this new category lies in the fact that Piracy *Jure gentium* is added. By the Judicial interpretation of the old Treaty, Piracy was limited to cases of Piracy by Municipal Law, on the ground that an offence, to come within the scope of the Treaty, must have been committed within the *exclusive jurisdiction* of the State making the demand, and Piracy *Jure gentium* was a matter cognisable by any State, whatever the nationality of the delinquents, and wherever committed.* Piracy, by the Law of Nations, was, however, one of the offences expressly enumerated in the Extradition Act, 1870, and it would seem that, should the present Treaty be ratified, there will

* *R. v. Tivnan*, 5 B. & S. 645; and cf. *In re Bennet*, 11 L.T.R. 488, and the American case of *In re Sheasle*, 1 Wood & Min. 66, cited in Wharton, *Digest*, p. 805.

be a mutual obligation on the part of each country to surrender alleged pirates *Jure Gentium* to the other State, if they are subjects of that State.

The new Treaty proceeds to re-enact more definitely or to supplement the provisions of the old one as to non-extradition for offences of a Political nature, mode of procedure, etc., but the only other alteration of primary importance is that introduced by Article III. :—"That no person surrendered by or to either of the high contracting parties shall be triable for any crime or offence committed prior to extradition, other than the offence for which he was extradited, and until he shall have had an opportunity of returning to the country from which he was surrendered."

Such a provision is, since the Extradition Act of 1870, an essential clause in any Treaty to which Great Britain is a party. No provision to the same effect having been made in the Ashburton Treaty, there had, until quite recently, been considerable friction, on more than one occasion, on this point between the United States and Great Britain.* In a recent case, that of *U.S. v. Rauscher*, however, where the prisoner was extradited by England on a charge of murder of a seaman, the Supreme Court appear, in December, 1886, to have completely overthrown the arguments of most of their own politicians and diplomatists, and to have held distinctly, in conformity with the opinion expressed by Dr. Wharton, when citing the judgment (*Digest*, II., p. 797), that the prisoner could not be tried on the charge of inflicting cruel and unusual punishment, though in connection with the same seaman and upon the same evidence as had been adduced at the Extradition.

The complete revolution in American practice caused by

* Especially in the well-known cases of *Lawrence*, 1875, and *Winslow*, 1876. Cf. Wharton, *Digest*, § 270, *passim*.

this Judgment was fully recognised by our own Courts in the very recent case of *In re Alice Woodhall*, 57 L.J. M.C. 72; Coleridge, L.C.J., Field and Wills, JJ., on an application for a *habeas corpus*, unanimously recognising the necessity of the assumption "that the Courts of the United States will 'be governed by the law declared by the Supreme authority of that country.'

In any case, the Article in the new Treaty, if the latter should be ratified, as there seems to be every reason to believe that it will and must finally settle the question, and put an end once for all to what has for the last forty years been a fruitful source of Diplomatic recriminations between the two countries.

As regards the Russo-American Treaty an unexpected and serious difficulty has arisen owing to the refusal of the U.S. Senate to accept one clause, known as the "Dynamite Clause," providing for the mutual surrender of political offenders when the latter are guilty of killing or attempting to kill the Sovereign or Chief Magistrate of the State demanding extradition, or any member of his family.*

The objection taken to this provision perhaps justifies to some extent the position assumed by the Senate. It points out that, in the case of offences within the scope of the clause, no Jury is allowed by Russian Law at the trial of the accused; the proceedings are all before a military tribunal, and are, to a great extent, secret, and therefore, it is argued, are altogether "contrary to the doctrines of modern penal jurisprudence."

On these grounds the Treaty was relegated to that Limbo of American Diplomacy, the Foreign Committee, and at

[* Such a limitation of the principle of the non-extradition of Political offenders has, however, been advocated by so distinguished an American Jurist as Hon. David Dudley Field, at a Conference of the Association for the Reform and Codification of the Law of Nations.—ED.]

present there seems to be no probability of its receiving the necessary ratification as long as the obnoxious clause is retained.

* * *

The Monroe Doctrine once more.

We had occasion some time ago to refer to an attempt to apply the Monroe Doctrine in a somewhat aggressive and startling manner to the question of the Panama Canal.* Early in the present year another remarkable attempt to assert the Doctrine in specific form was made by a member of the Senate of the United States in the shape of a Resolution on the subject of the recent Cuban Loan.† The Senate was asked to acquiesce in a proposition to the effect that "Everything done or attempted in Cuba tending in any way to transfer the financial and political control of Cuba to any European power is contrary to the policy and best interests of the U.S., and must be discontinued and protested against."

Seeing that the premises on which this conclusion purported to be based consisted merely in the fact that by a decree of the Queen of Spain, and with the help of German financiers, more or less under the influence of the German Government, the Public Debt of Cuba has been consolidated, the unbiassed third party is almost inclined to say "*non constat.*" The Senate, however, was by no means disposed to return this answer, but contented itself, for the time, with leaving the matter in the hands of the Foreign Committee.

* * *

Foreign Marriages in "Heathen" Countries.

Two instructive cases on the doctrine in *Hyde v. Hyde*, L.R. 1 P. & M. 130, have recently been decided, one

* *Law Magazine and Review*, No. CCLXXI., February, 1889, p. 146.

† *Times*, 7th January, 1890.

in our own country, and the other in a Court of the United States.

The former, *Brinkley v. Att.-Gen.*, VI. *Times L.R.* 191, was a petition under the Legitimacy Declaration Act, 1858, for a declaration of the validity of a marriage contracted in Japan by a domiciled Irishman resident in Tokio, with a native lady named Yasu Tauka. The ultimate object of the petition was to secure the legitimacy of the issue of the marriage.

It was proved by a certificate signed by two high Japanese officials and by affidavits and oral evidence, that, as regards formalities, the *lex loci actus* had been conformed to in every essential respect, and also that the union so contracted was by Japanese law monogamous and permanent.

The real legal point at issue was whether, in view of the fact that Japan was strictly a "heathen country," outside the sphere of Christendom, any marriage there contracted by the forms there in vogue could be recognised as valid here.

The objection taken appears to have been much the same as that on which the recent case of *In re Bethell*, 38 Ch. D. 220, turned; but it was clearly distinguishable from the latter on the ground that the Japanese marriage was monogamous, and that the laws and customs of Japan did not recognise in any way a polygamous or bigamous union. On these grounds, the President decided in favour of the validity of the marriage, and his finding seems to be altogether satisfactory.

Japan, by the progressive tendencies which it has evinced in modern times in the direction of Constitutional and Social Reform, as well as of intellectual development and culture, has attained a unique and pre-eminent position among Oriental States. It can only be now termed a "heathen" country, by a highly technical use of the term, or by an almost equally technical antithesis to the

expression "Christendom." At all events, the absence of any recognition of polygamy in the country would place marriages contracted in Japan outside the scope of the decision in *Hyde v. Hyde*; and as a matter of fact Mr. Brinkley's marriage exactly complied with Lord Penzance's definition of legal marriage in that case, as "a voluntary union for life of one man and one woman to the exclusion of all others."*

If the petitioner had been resident in China, the case would have been more difficult.

In America, a peculiar question on the same subject recently came before the Supreme Court of Michigan, in the case of *Kobogum v. Jackson Iron Co.*, 43 N.W. Rep. 602. The matter in dispute was a claim to certain property by inheritance derived from a marriage between Indians in a tribal relation. The particular marriage was valid by the laws or usages of the tribe, and contracted at a time when there was no law of the United States on the subject of Indian marriages. The Supreme Court of the State, in an elaborate Judgment, delivered by Mr. Justice Campbell, held that as regards the question of inheritance, the marriage must be looked upon as valid.

The learned Judge pointed out that by the U.S. Constitution the tribes were placed beyond the jurisdiction and laws of the State, "and there was no other law interfering with the full jurisdiction of the tribe over personal relations." "While most civilized nations in our

[* This definition is, of course, not one which owes its origin to Lord Penzance, being not only in exact conformity with the doctrine of Roman Law, but also expressing the doctrine of the best Theologians of the Western Church, at least as regards Christians, according to the view which has the support of mediæval Roman Pontiffs, that the spouses are themselves the ministers of the Sacrament of Matrimony. Cf. for this, Friedrich, *Gott meine einzige Hoffnung*. Leipzig. Honer. 1873. p. 190. "Die Theologen erklären deshalb auch fast einstimmig, dass die Brautleute selbst die Spender des Sakramentes der Ehe sind."—Ed.]

day wisely discard polygamy, and it is not probably lawful anywhere among English-speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful." This latter is a dictum which, perhaps, somewhat clashes not only with the remarks of Lord Penzance and other English Judges, but also with the view which the Supreme Court, U.S.A., takes of Mormon "sealings." It must be remembered, however, that this was not a case of the intermarriage of a person of European extraction with an Indian, but an ordinary union between members of the same tribe. In any case, the conclusions of the Court were certainly irresistible that "we must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground so long as our own laws are not binding on the tribes."*

* * *

The Samoan Conference.

The unfortunate dispute in which we were involved a short time ago in connection with Samoa, has reached a temporary termination, which, it is to be hoped, may become final, of an entirely satisfactory character.

In pursuance of the scheme drawn up and signed on 14th June, 1889, by the three Plenipotentiaries representing Germany, the United States, and our own country, and recently ratified by the Governments concerned, a "General Act of the Samoan Conference of Berlin" has lately been published,† which is an extremely noteworthy document both from the point of view of Politics and of International Law.

This Instrument may be taken to settle the whole question

* Among the English cases referred to was *Cursetjee v. Perozeboye*, 6 Moo. 34.

† *London Gazette*, No. 26,017, Friday, January 24th, 1890.

of Samoan Government, internal and external,* and its chief provisions are briefly the following:—By Article I., the Neutrality of the Islands is guaranteed; subjects of the Signatory Powers are to have equal rights of residence, trade and personal protection; the Independence of the native Government is recognised, as also the free right of the natives to elect a king or chief; and finally it is mutually stipulated that none of the Signatory Powers shall exercise any separate control over the Islands or the Government. Article III. provides for the constitution of a Supreme Court, under the jurisdiction of a single Judge, assisted by a clerk or marshal. The title of the Judge is to be "Chief Justice," and he is to be nominated jointly by the three Signatories, or in case of disagreement by the King of Sweden and Norway. His jurisdiction is to extend to the following matters:—

1. All Civil suits concerning real property in Samoa.
2. All Civil suits between foreigners of different nationalities.
3. All crimes by natives against foreigners and by such foreigners as are not subject to any Consular Jurisdiction.
4. Any differences between the Signatory Powers and Samoa which they shall fail to adjust by mutual accord, and which shall be referred to the Chief Justice.

The remaining Articles deal chiefly with the locally important matters of finance, taxation, and the customs.

Finally, it is agreed that the Act is to remain in force till changed by common consent of the Signatory Powers, at the suggestion of any of them.

[* It should be borne in mind, however, that, according to the *Belgian News*, 1st February, 1890, Count Herbert Bismarck is reported by the *Kölnische Zeitung* as having expressly limited the treatment of questions of Internal Samoan Government to the point at which they touched External questions, such as that of an efficient Protectorate.—ED.]

Foreign Judgments.

Two cases of some importance on the subject of Foreign Judgments have been decided since our last issue. The first, and in some respects the more important, owing to its being a decision of the highest Judicial authority, is the case of *In re Henderson, Nouvion v. Freeman*, L.R. 15, App. Cas. 1; 62 L.T. 189. The House of Lords, affirming the order of the Court of Appeal reversing the finding of North, J., held that a Spanish "remate judgment" is not such a final Judgment as to enable the successful party to sue upon it in our own Courts.

Professor Westlake, it may be noted, states the rule on this subject in these words: "The foreign judgment in " *personam* which is to be sued upon or otherwise enforced " [here] must be such as lays on the defendant a present " duty to pay."* And so the Editors of the recent edition of Phillimore's *International Law*: "It [the Tribunal] must " have decided definitively and either in the last resort (*en "dernier ressort*) or, which is the same thing, without any " appeal prosecuted from its decision to the Superior " Courts of the State in which it was pronounced."†

In *Henderson's Case* the question was not altogether as to the existence of a right of appeal, or a stay of execution pending appeal, as in the old cases of *Patrick v. Shedden*, 2 E. & B. 14, and *Scott v. Pilkington*, 2 B. & S. 11; but a somewhat more complicated one, arising out of the peculiar nature of the Judgment on which the English action was based.

Evidence was given at the trial to shew that by the Law of Spain a man in whose favour documents of a certain character have been executed may institute what are called in Spain "executive" proceedings, in which he may obtain a kind of Summary Judgment—the only pleas open to the

* *Private International Law*. Ed. 1880, p. 302, § 295

† Vol. IV., para. DCCXXXIV., p. 759, *Commentaries*, 1889.

defendant being those which admit the original right of action, but allege that the latter has been lost either by a contract not to proceed, or satisfaction, payment, or other discharge of a similar nature.

Such a Judgment, however, does not preclude either party from taking "plenary" or "ordinary" proceedings on the same subject-matter, in which every possible defence may be set up, and the "executive" decree does not occupy the position of *res judicata*. It is, nevertheless, open to the plaintiff, upon giving security, to enforce the "remate" Judgment, though the plenary proceedings are pending. The House of Lords, on these facts, held, confirming the Court of Appeal, that the "executive" Judgment was not such a Judgment as the law of England would allow to be made a cause of action so as to found on it alone a proceeding in this country.

An equally interesting point was raised in the case of *Boissière and Co. v. Brockner and Co.*, VI. *Times L.R.* 85. The decision of the Court of Appeal in the case of *Voinet v. Barret*, 55 *L.J. Q.B.* 37, will be remembered as dealing in a very clear and unequivocal way with the question as to whether voluntary Submission by a defendant to a particular jurisdiction constitutes such jurisdiction a competent *forum* for the purpose of enforcing its decrees here.

In *Voinet's case* it was held that submission by the defendants in order to protect property which they merely apprehended might in the future be seized, although not in fact already seized, was not so far *involuntary* as to avoid action on a Judgment here. In *Boissière v. Brockner*, there was no question of seizure of property apprehended or otherwise, but one as to whether an appearance under protest, followed by voluntary appeals in which the protest against the jurisdiction was still maintained, was "voluntary" or not.

Cave, J., held that it was voluntary, on the ground that the true test in such cases was that enunciated by the Master of the Rolls in *Voinet v. Barret*, i.e., "An appearance is voluntary unless it is caused by the fact that property has already been seized by the foreign tribunal—for every appearance which is not made under pressure is a voluntary appearance."

So again in the words of the Court in the latter case; "A man cannot properly be said to protest against doing something which he is not obliged to do but which he deems it for his interest to do."

A further point taken by the defendants was that the proceedings in the French Courts were contrary to "natural justice." This was at once overruled by the Court as based on an altogether mistaken view of the meaning of the term. The sole ground for the plea was the fact that the Court of Appeal at Rouen had ordered accounts to be taken by an *avoué* who happened to be the *avoué* employed by the plaintiff in the case. Cave, J., said that the ordinary course of procedure had been followed, and that the mere fact that the French practice differed from our own was no reason for stigmatising the proceedings as "contrary to Natural Justice." As to when this latter plea will be allowed, the remarks of the Master of the Rolls in *Voinet's case* (p. 41) are very apposite, the conclusion from this and other cases perhaps being that it will only lie where a Court has grievously abused its own process, or made an order in direct disregard of important matters brought distinctly before its notice, as in *Simpson v. Foggo*, 32 L.J. Ch. 249, and never in respect of any question arising out of the merits of the case.

It may not be altogether out of place to mention in this connection, a curious case which was recently decided by the Court of Appeal *sub nom. Eschger and Co. v. Morrison and Co.*, *Times* L.R. VI., 145. The proceedings

were in the nature of an Interpleader issue as to the ownership of certain goods. The immediate question before the Court of Appeal was whether an order of the Divisional Court was valid, which practically made "a "foreign firm wholly domiciled abroad defendants without "observing any of the conditions which the law required "to be observed before making a foreigner a defendant in "an independent action."

The Court of Appeal held that the order of the Court below must be set aside.

* * *

The Slave Trade as an International Question.

The Treaty between Great Britain and Italy for the suppression of the African Slave Trade, signed last year and recently issued as a Parliamentary Paper,* is deserving of some notice by the student of International Law. The material part of the Treaty is in Article 1, by which the two Governments "engage to prohibit all Trade in slaves, either by their respective subjects or under their respective flags, or by means of capital belonging to their respective subjects; and to declare such traffic Piracy." More comprehensive terms can hardly be imagined, and they are strengthened by other Articles conceding the mutual right of visitation and search within certain limits. Any ship captured on suspicion is to be brought into port for adjudication, and confiscated or released with compensation according to the evidence adduced.

It will be remembered that Italy was one of the States engaged in the East African Blockade, instituted in 1888, as a concerted blow at the Slave Trade on the Zanzibar Coast.

It might fairly be questioned now, particularly in view of Article 9 of the General Act of the Berlin Conference,

* Italy, No. 1 (1890).

1885, and the action of the Brussels International Conference on the Slave Trade, whether it is not pretty well established as a rule of International Law that the Slave Trade is illegal, and liable to be regarded as Piracy *Jure Gentium*.

* * *

Lis Alibi Pendens.

The principle enunciated in *Hyam v. Helm*, 24 Ch. D. 531, that superior facility of procedure or execution abroad tends to negative the vexatiousness of a multiplicity of actions, was again clearly laid down by the Court of Appeal in the case of *Baird v. Prescott & Co.*, Times L.R. VI., 231, where the facts more strongly favoured the application of the principle than in the earlier case.

In *Hyam v. Helm* there were certain general advantages to be gained by an action being brought in America, but in the later case, the relief sought in the Foreign Court was of a kind which could only be obtained there. The Court therefore refused to stay the Foreign suit as vexatious.

* * *

English and Foreign Bankruptcies.

A somewhat similar question to that just mentioned came before the Court of Appeal in the case of *In re the Bankruptcy of Artola Hermanos*, Times L.R. VI., 271, on an application by the Syndic of a French Bankruptcy to set aside or stay proceedings in the same Bankruptcy in this country. It will be remembered that under Section 109 of the Bankruptcy Act, 1883, the Court has discretionary power, "for sufficient reasons," to stay proceedings under a petition.

The Firm in question was a Firm, as Fry, L.J., said probably domiciled in Spain, but also having business houses in Paris and London.

The Court held, in accordance with *Lyall v. Jardine*, L.R. 3 P.C. 318, and *Banco de Portugal v. Waddell*, 5 App. Cas.

161, and other well-known cases, that the English adjudication was perfectly proper, and although in some cases proceedings here might be stayed pending a foreign Bankruptcy (*Ex parte Pascal*, 1 Ch. D. 509), especially if the foreign country were the place of the debtor's domicil, yet in the present case there was no sufficient reason to grant a stay, particularly in view of the fact that large assets of the Firm were in England.

JOHN M. GOVER.

Quarterly Notes.

The Bankruptcy Bill, 1890.

Modern legislation in this country on the subject of Bankruptcy has been, it may certainly be said, increasingly Draconic in its severity towards the Bankrupt. The tendency to such severity seems to be a feature which bids fair to become the dominant characteristic of English Law in this branch. We believe that this tendency is to be regretted, and therefore we are glad to draw attention to some useful criticisms of this year's Bill which have reached us from the Incorporated Law Society of Liverpool. The Committee which puts forth these criticisms is of opinion that the general tendency of the Bill, as, indeed, it might be added, of all our recent Legislation on this subject, is to destroy the practice of arrangements outside the Court between a debtor and his creditors. We do not think that this can be denied. The only question can be whether the old practice in that respect worked well. The Committee thinks that it did : successive Governments and their majorities appear to have thought the contrary. But it may be questioned how far the majorities in Parliament really thought about it at all. They probably got hold of a hazy sort of conception that the Bankrupt was a fraudulent

kind of person, like the man who sold oleo-margarine for butter, and that a short and easy way must be found for putting an end to him. Whether this can be called Scientific Legislation may perhaps be doubted. We may be told that it is the best which can be expected under present circumstances : if so, that is not saying much for the best. What appears clear to us, as to the Committee of the Liverpool Incorporated Law Society, is that not by any means every Bankrupt is fraudulent : probably the majority may be taken to be innocent. Of course, it is a very nice thing, and one which provides a pleasing amount of sensation in certain quarters, to be able to drive into Court a person who is unfortunate enough to bear a title. This is good capital for the Demonstrations which seem to be taking their place as part of our mob-ridden existence. But it is, we submit, very bad policy for those who really wish to preserve the existing Constitution, or who profess to think it worth preserving. What seems obvious to any unprejudiced mind is what the Liverpool Committee urge, viz., that while on the one hand there should be power to punish dishonest and fraudulent Bankrupts, there should not, on the other hand, be any necessity to resort to the Court in cases in which the creditors are satisfied that there has been no improper conduct on the part of the debtor, and are consequently willing to accept a composition or private arrangement ; we wish the Liverpool Committee's views were more generally endorsed than our experience of the Past leads us to hope that we shall see them endorsed. They appear to us to be moderate and rational, but moderate views are too frequently at a discount, and common sense is, we are told, one of the rarest of senses.

The Public Trustee Bill, 1890.

We are in receipt of another communication from the Liverpool Incorporated Law Society, dealing with the

important innovations proposed to be introduced into our Legislation by the Public Trustee Bill. That a Bill introduced into the House of Lords by the Lord Chancellor deserves the freest and fullest expression of opinion on the part of all concerned in its provisions need scarcely be said. The disrespect, if any, would lie rather in not considering it, and therefore we feel that no apology is needed for urging the claims of this Bill to the most serious consideration of all classes of the community. It is alleged that the Public in general experience great difficulty in finding suitable Trustees. In the nature of things this allegation can scarcely be proved; it can at best only be taken on the authority of those who make it, or allowed as a possibility about equally incapable of proof and disproof. On this narrative, however, it is proposed that the State shall step forward, and provide us babes in the wilderness with a "Public Trustee." In other words, as the Liverpool Committee puts it, the Bill proposes to constitute a Government Department for the Administration of Private Trusts. The broad question which has to be faced, therefore, is whether such a creation is either necessary, or at least desirable. We are not persuaded that either case has arisen. Whether it might arise in a distant Future, we do not know, and do not feel bound to enquire. As far as we can see, such a creation would be only another and further step in the direction of that Bureaucracy and Paternal Government which seems to be the identical goal of outwardly very different and even opposing currents of Political Partisanship: we cannot call it Political Science. If the Liverpool Committee is right in its reading of the powers proposed to be vested in the Public Trustee, viz., that he might act as "executor or administrator, guardian, committee of a lunatic, receiver and manager, official or other liquidator, trustee in bankruptcy, trustee for debenture-holders, or perhaps even as a

director of a company," it would appear to be time for the private individual to retire altogether from the scene, and commit the happy despatch. If the Committee is right in interpreting the language of the Bill as shewing that it is contemplated that the proposed Department will yield a profit to the State, an altogether new departure will have been taken, and Private Trustees may well think that they have had somewhat hard measure dealt to them in that their onerous functions have been carried out under the self-denying ordinance that they should receive no pecuniary benefit from the execution of their trust, unless expressly conferred upon them by the person creating the trusts.

These *gravamina* are serious enough, but they are only the merest outline of the difficulties which meet us on the threshold of the Bill. In so far as any real want may be felt by the Public for a suitable Trustee, the Liverpool Committee believes that it would be adequately met by the extension of the principle of the Trust Companies Bill, which is also before Parliament. In any case, good cause has been shewn, we believe, for exercising the greatest care before what appear to be such undesirable innovations as are embodied in the Public Trustee Bill receive the seal of Parliamentary approval.

Reviews.

Elements of the Law of Torts. A Text Book for Students. By MELVILLE M. BIGELOW, Ph. D., Lecturer in the Law School of the University of Boston, U.S.A. Cambridge. University Press. 1889.

Outlines of the Law of Torts. By RICHARD RINGWOOD, M.A., of the Middle Temple and North-Eastern Circuit, Barrister-at-Law, late Scholar of Trinity College, Dublin. Stevens and Haynes. 1887.

A Compendium of the Law of Torts. Specially adapted for the use of Students. By HUGH FRASER, M.A., LL.M., of the Inner Temple and Western Circuit, Barrister-at-Law. Lecturer on Common Law to the Liverpool and Newcastle-upon-Tyne Boards of Legal Studies. Reeves and Turner. 1888.

It may be convenient to notice these three recent works on Torts together. Some time ago there was a dearth of treatises on this subject, and there were no small books at all. There was the well-known Addison—but no other complete treatise, as far as we remember. Large works, such as Broom's *Common Law*, devoted some of their space to the subject, and the law could also be picked out from Smith's *Leading Cases*. But of late years, as if to make up for the previous want, there has been a rush of supply of both fair sized and small works. First in the field came Underhill—a small work—then Ball's *Leading Cases on Torts*—then in rapid succession followed fair-sized books by Hastings, Piggott, and Pollock; then Shearwood's small students' works; and now we have more works, two English and one American. Surely these books are not all wanted, unless they deal with the subject in a fresh manner, or introduce matter which has been omitted in the works already in existence; but on examination we fear that we cannot go this length. The best is Mr. Bigelow's. He states in his preface that his American edition found favour with the Law School at Cambridge, and it was suggested that he should prepare an English edition of his American work, which he has done. We are glad of this, for we are always happy to hail American works and authorities. They infuse fresh blood into our literature in Law as in other branches; they put things with which we are familiar in a novel and often unexpected manner, hence our prepossessions are quite in favour of a Law-book coming from an American source. But when we look into it, we regret to find what we can only call an awkward and, as it appears to us, unscientific arrangement of the subject, and a rather weak exposition of the Law all through. It is divided into three parts. The first, instead of a brief heading, such as "Personal Torts" or "Covin and Malice," is somewhat circuitously worded as follows: "Breach of duty to refrain from fraud or malice," the second is, "Breach of absolute duty," and the third, "Breach of duty to refrain from negligence." Why these should have been made the prominent divisions of the subject we are at a loss to conceive. The author tells us that the order

"is entirely academic, but it is believed to be natural." By "academic," we presume, he means "for learners." We, in our innocence, should have deemed that for learners the natural order would be the time-honoured order, viz.:—1. Classification of Torts. 2. Torts to the person, property and reputation. 3. Remedies. 4. How discharged. This is the simple and natural order of arrangement, and one that has uniformly found favour.

Turning to Mr. Ringwood's work, we find a better arrangement, and we are not launched instantly *in medias res*. It begins with "Torts generally"—then follows "who may commit them," then the kinds of Torts, and lastly the measure of damages. The book is fairly readable, and is compressed within the convenient compass of 200 pages. But we have had all this in other works, over and over again, and his book is not likely to cut out any of the others by intrinsic merits of its own. What then is the use of it? If another book on "Tort" is wanted it is, we venture to suggest, one which shall treat on "The proper place of Delict in a Legal system," in fact, a scientific treatment and arrangement of the subject. There are some valuable hints on Delict and its position in Jurisprudence in Professor Hunter's excellent *Roman Law*. We want a work having such a basis of structure that the reader shall be able to obtain a bird's-eye view of this apparently simple, but really abstruse, Common Law subject, and to detect at once what is and what is not a breach of duty, and its remedy, if it is one.

Mr. Fraser, by way of apologising for his book, says that he is under an obligation to supply his pupils at Liverpool with a printed analysis of his Lectures, a fact which affords a reason for the publication, otherwise it might seem that such a book as Shearwood's *Tort*, similar in size and character, had already supplied the want then existing for a very small treatise for Examination purposes.

A Treatise on the Law Relating to the Custody of Infants. By LEWIS HOGHEIMER, of the Baltimore Bar. Baltimore. John Murphy & Co. 1887.

Simpson's is the only work on Infants we have hitherto had in use in this country, except in so far as the subject is included in Eversley's *Law of the Domestic Relations*. There is room for a separate Treatise, but we doubt whether this work is altogether

as well suited for the practitioner as Simpson's. There is a good deal of matter devoted to the subject of local institutions and laws, which, though, of course, useful for practitioners in the United States, is of no practical utility in this country. Cases on the Constitutionality and Construction of Local Enactments are, indeed, of interest to the Constitutional lawyer, from the point of view of Comparative Jurisprudence, but are of no other use. The chapters containing the Historical portions of the work, and those on the remedy by *Habeas Corpus*, and on the nature and limitation of the rights of Custody, may, however, be commended as the most useful to English practitioners. Most of the noteworthy English Decisions are referred to, and in external form and general get-up, Mr. Hochheimer's book is all that can be desired.

Outlines of International Law, with an account of its Origin and Sources, and of its Historical Development. By GEORGE B. DAVIS. Sampson Low & Co. 1888.

Remembering our debt to such Publicists as Wheaton, Story, Kent, Halleck, and others, we are always glad to hail a work on International Law from the pen of an American Jurist. We fear, however, that we must say of this work that it does not seem to fill a real want. In itself it is all that can be desired. It is clearly and fluently written, and is of a convenient size, viz., some 470 pages. It deals with the subject in the usual order, chapter by chapter, so that it can very well be read along with other works. But it is a book precisely the same in volume, contents, and general character as those of Kent, Woolsey, Manning, and two or three more. Of course, Mr. Davis's book is more modern than those just cited, and is written to deal with the subject under its modern aspect, whereas most of the former works have been brought down to date by various editors, and while the original text remains intact, the innovations take the form of notes at the foot of the page. We would willingly have seen a little more space devoted to Private International Law. There are only eight pages allotted to that branch. In a book treating with the subject generally, both branches should be treated with a due regard to proportion, but the tendency with nearly all writers is to sacrifice what may seem to them the smaller branch in favour of the larger one. The best written chapter and the longest, is that on War. Mr. Davis gives copious references to authorities.



THE

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I.—THE NEWFOUNDLAND FISHERIES DISPUTE.

THE dispute which has arisen between Great Britain and France as to the fishing rights claimed by France on the shores of Newfoundland has been in existence for a century and a half. It has, on several occasions, seriously endangered the peaceful relations of the two great Powers. It ought now, if possible, to be brought to a final, satisfactory, and friendly termination. With the hope of trying to help forward such a desirable result, I propose, in this Article, to lay the whole of the material facts before the readers of this *Review*.* But having, in a former Article,* explained the general principles of International Law applicable to fisheries rights, I shall not introduce, here, any discussion of those principles.

In the present dispute, the great questions which have arisen between the parties are as follows:—1st. Have the French people an absolute and exclusive right of fishery between Cape St. John and Cape Ray? 2nd. Have they a similar right to catch lobsters, and to preserve them for exportation? 3rd. Have the British a common right of fishery between the points above indicated? 4th. Have they a right, in common with the French, or an absolute and exclusive right, to catch lobsters, and to preserve them for exportation? Subordinate to these great questions, other questions, in the shape of claims for damages by the

* * *Law Magazine and Review*, No. CCLXVIII., for May, 1888.

French against the British, and *vice versa*, have sprung up between the parties in the assertion of their respective rights. But I do not intend to treat these lesser questions at any great length. Still, these minor questions are of considerable importance in themselves ; because they vividly illustrate the contentions of the different parties concerned, and might advantageously become the means of obtaining an important decision, by Arbitration or Judicial decision, as to the general rights of the parties. As the whole dispute sprang from the Treaty of Utrecht in 1713, I shall, first of all, give the reader a brief historical statement as to Newfoundland before that date : then, quote the words of that Treaty, and of the subsequent Treaties, relating to the subject on hand ; thereafter, state the respective claims and contentions of the French, British, and Newfoundland Governments ; and finally, indicate the basis of a fair and amicable arrangement between all the parties involved. Here, however, I may observe that I have not to discuss the fishing rights on the Newfoundland Banks, which are available for fishing to the whole world, being situated in the ocean, and beyond the territorial limits of any country or Government. The Newfoundland Banks Fishery is largely in the hands of French and American fishermen, and is infinitely more valuable than the Newfoundland Coast Fishery, which has been conceded to the French, and which I am here specially to discuss. The Newfoundland Cod Fisheries have been prosecuted by Europeans for nearly four hundred years, and shew no sign of diminution.

I.—HISTORY BEFORE 1713.

Newfoundland is the most ancient of the Colonial possessions of Great Britain. It was discovered by Cabot in 1497. Seven years after Cabot's discovery, the fishermen of Normandy, Brittany, and the Basque Provinces were engaged in the Newfoundland Fisheries. In 1517, Portugal,

France, and Spain engaged largely, and in 1578 still more largely in these fisheries. Down to the latter date, the English people had not learned the vast importance of Cabot's discovery ; but they soon afterwards began to attempt to plant colonies on the shores of the island. As early as 1626, a hundred and fifty vessels went every year from Devonshire to the Newfoundland coasts to catch, salt and dry cod, and other fish, and then depart to England with their produce. The western English merchants and shippers opposed all settlements on the Newfoundland coasts, and the English Government supported them in a short-sighted policy for a hundred years.

Attempts were made, at a very early date, to colonise Newfoundland by means of Charters granted by the Crown of England. The first Royal Charter was granted in 1578 by Queen Elizabeth to Sir Humphrey Gilbert, who landed in St. John's Bay in 1583, and took possession of the country in the Queen's name. The second Charter was granted in 1610 by King James I. to the Earl of Northampton, Sir Francis Bacon, and several others, by the name of the Treasurer and Company of Adventurers and Planters of the City of London and Bristol, for the colony of Newfoundland. In this grant, there was a reservation to all Englishmen of an entire liberty to fish. Soon afterwards, a third Charter was granted to Sir George Calvert and his heirs of a tract of land called the Province of Avalon, lying in the south-east of the island. Sir George planted a colony at Ferryland, 40 miles north of Cape Race, and there built a handsome mansion in which he and his family resided for many years. The French harassed his settlement by incessant attacks, and he abandoned it, and went to Maryland, and founded the city of Baltimore. After the Restoration, Lord Baltimore, who was the heir of Sir George Calvert, and who, in or about 1628, had been deprived of the Province of Avalon, obtained a Royal

order in 1660 for a restitution of that province to him as heir of Sir George Calvert. There was also a grant to him of the property of all islands lying within ten leagues of the eastern shore, together with the fishing of all sorts of fish, but saving to the English people the free liberty of fishing and of salting and drying fish. In 1754, Lord Baltimore claimed to be put into possession of this Province of Avalon, and of all the Royal jurisdictions and prerogatives thereto belonging. This claim was referred by the Board of Trade to the Attorney and Solicitor-General; and, on the advice and recommendation of the Law Officers of the Crown, was rejected by the Board, and has never since been renewed. The fourth Charter was granted in 1628 to the Marquis of Hamilton, the Earl of Pembroke, the Earl of Holland, Sir David Kirk, and others, and included the Province of Avalon. It declared that no person should plant or inhabit any place within six miles of the sea shore between Cape Race and Cape Bonavista. All these four Charters, I wish to observe here, granted exclusive territorial and fishing rights within their respective territories. In consequence of sundry abuses and disorders committed every year among the fishermen upon the coast, Captain Richard Whitburne was sent out in 1615, with a commission from the High Court of Admiralty, authorising him to impanel juries, and make inquiry upon oath, in regard to such abuses and disorders. Afterwards, in 1633, the Star Chamber took up the subject of the Newfoundland fishery, and made certain rules and regulations as to fishing and theft, and the trial of offences, and declared that these laws were to remain in force until annulled by His Majesty. Thereafter, on the 20th February, 1633, a fifth charter was granted in accordance with the terms of the order made by the Star Chamber to the Merchants and Traders of Newfoundland.

On the 24th January, 1660, there was awarded a renewal and confirmation of the Charter granted to the Merchants and Traders in 1633. Then, on the 23rd December, 1670, the King of England ordered the several rules recommended by the Lords of the Council appointed for matters of Trade, to be added to the former Charter. These new rules authorised His Majesty's English subjects to take bait and fish in Newfoundland, provided they submitted to the established orders. On the 12th March, 1670, Charles II. had granted full right of fishing to British subjects in Newfoundland; and prohibited all strangers from fishing between Cape Bonavista and Cape Ray.

In February, 1674, the question of appointing a Governor was seriously brought forward, and was referred by His Majesty's Committee for Trade and Plantations, and was dismissed, and their lordships proposed that all plantations in Newfoundland should be discouraged; and that the commander of the convoy for the ships trading to Newfoundland should have commission to declare to all the planters that they must either voluntarily leave Newfoundland, or else, that the Charter of 1628, by which all planters were forbidden to inhabit any place within six miles of the shore from Cape Race to Cape Bonavista, must be put into execution.

In 1675, Sir John Berry, who had been appointed commander of the convoy to Newfoundland, reported, on the state of Newfoundland, to the Lords of the Council for Trade, and assured their lordships of the necessity of encouraging a colony in Newfoundland. He urged that, if such colony was not established, the French would take advantage of our intended removal, and would make themselves masters of all the harbours and fishing places about the island, or that the French in Newfoundland would entice the English planters to settle among themselves to the great prejudice of the English fishery.

The struggle between the Adventurers and the Planters increased in violence ; and in 1676, the King ordered the Adventurers not to molest the inhabitants in their houses and fishing stages, so far as these had been possessed according to the usage of the preceding few years, until further orders. A Report, dated 10th September, 1677, by Sir William Pool, from St. John's Harbour, is very interesting in regard to the state of fishing at that time, and the relations existing between the English Planters and the English fishing Adventurers. According to this Report, the French planters were very much encouraged by the Governor whom they had at Placentia. Further, they had the same accommodation in the Newfoundland harbours as the English fishermen themselves. In December of the same year, the Lords of Council for Trade and Plantations, on the complaint of the western English Adventurers, reported against the transport of passengers to Newfoundland from the west of England to act as hired servants, in private boats, in catching and curing fish in Newfoundland. Against this representation of the King's Council, the inhabitants of Newfoundland presented a petition. The dispute was argued by counsel before the Council, and the matter was referred to the Committee of Trade to propose some regulations between the Adventurers and Planters for the preservation of the interests of the Crown, and the encouragement of navigation and the fishing trade. Nothing further appears to have been done till after 1696, when the Board of Trade was instituted ; and in 1697, the new Board took up this vexed question of the Newfoundland fishery. They reported to the King that planters, in a moderate number, were at all times convenient for the preparation and preservation of boats, ships, and other things necessary for the fishery, but that they should not exceed a thousand.

Shortly afterwards, in 1698, was passed the Statute 10 & 11 Will. III., c. 25, intituled, "An Act to encourage the trade to Newfoundland." It was little more than a statutory enactment of the rules, regulations, and constitution that had chiefly prevailed there for some considerable time. This Statute established the exclusive fishery claims of the West of England Merchants and Adventurers against the Newfoundland planters. But it was never very strictly enforced. It also established Free Trade and fishery between England and Newfoundland. It enacted that no alien or stranger whatsoever should at any time thereafter take any bait, or use any port of trade or fishing whatsoever in Newfoundland, or in any of the adjacent islands or places mentioned in the Statute. It also contains sundry regulations as to the Newfoundland fishery, fishing, stakes, landing, fuel, &c., and for the trial of offenders by Courts of Oyer and Terminer in any county of England.

In 1702 war broke out between England and France, and the English Fishery and affairs in Newfoundland were greatly disturbed by the French. But the most serious disturbances arose from quarrels between the English Colonists who desired free trade in fishing and the West of England merchants who resisted free trading or fishing in the island. Various efforts were then made for the preservation of peace, order and justice in the island ; but the French had become so strong, and had so much disturbed the English possessions in the island, that every effort of that kind had to be abandoned to plans for immediate and necessary defence. Throughout the year 1710, the West of England merchants were making representations to the Board of Trade, beseeching that, in any Treaty of Peace with the French, Newfoundland might be wholly reserved to the English. This suggestion was adopted by the Board, and it appears to have been pressed very strongly on the Ministers of Queen Anne. But, unfortunately, it was either ignored, or

set aside in the Peace which followed between England and France. At the Peace of Utrecht, England obtained possession of Newfoundland to a greater extent than she had ever before enjoyed it; Placentia was ceded to the Queen of Great Britain; Newfoundland was acknowledged to belong in full sovereignty to Her Majesty; and the French were granted a liberty to fish, as after-mentioned, within certain specified limits on the East, North, and West shores of Newfoundland. A new prospect arose in regard to the development of the internal trade and of the fishing industry in Newfoundland, and a new and hopeful spirit was infused into the inhabitants and into the West of England merchants as to their future success. But the surrender of the ports which had belonged to the French occasioned great discontent among the French in various ways—(1) as regards the private ownership of their lands; and (2) as regards the rights of fishing which were granted to them; and (3) as to how far the laws of Newfoundland applied to the former French territories in Newfoundland.

In 1729, the first Civil Government was established by a Commission in favour of Captain Henry Osborn. The Commission begins by revoking so much of the Commission to the Governor of Nova Scotia as related to the government of Placentia, or any other forts, in Newfoundland; and then goes on to appoint Henry Osborn Governor and Commander-in-Chief of the Island of Newfoundland, the fort and government of Placentia, and all other forts and garrisons erected and to be erected in that island. The appointment of such a Civil Governor was much needed. The Government of Newfoundland from 1698 to 1728 had gone from bad to worse, and had resulted in anarchy and disorder. A new system was absolutely necessary. The provisions as to the appointment of the Admirals who had been appointed, every year, under the Act 10 & 11 Will. III., to decide differences in relation to fishing rooms, &c., in New-

foundland, had been entirely neglected. Worse still, the island was left in the hands of the inhabitants without any form of Civil Government. But the new Civil Government, attempted to be set up by the King on his own authority, was quickly rendered impotent by the complaints and attacks of the West of England merchants, and also by the constant opposition of the Justices of the Peace appointed by the Civil Governor, and of the Fishing Admirals, appointed by the West of England Merchants under their Charter. In 1750, a Commission was granted, under the Great Seal, to the Governor of Newfoundland to hold a Court of Oyer and Terminer, once a year, to try all cases of robberies, murders, and felonies, and all other capital offences, except treason.

About 1758, the trade and fishery of Newfoundland appear to have been in a declining state for some years previously. At the Peace of 1763, a favourable opportunity appeared to arise for encouraging this fishery. Accordingly, the Board of Trade called on the western towns for advice and information, and on such towns in Scotland and Ireland, e.g., Glasgow, Cork, Waterford, and Belfast, as had engaged in this trade. But, on the other hand, the French turned their attention to the arrangements necessary for the protection of their fishery rights in Newfoundland, and to the British Government they made certain proposals which were more or less accepted. Even at this early time difficulties had arisen as to the French rights of fishing in and around the Newfoundland shores. However, the character of the Newfoundland fishery had entirely changed from what it was in 1698, when the 10 & 11 Will. III., c. 25, was passed.⁷ At this time the Western English merchants exercised fishing rights from Cape Bonavista to Cape Ray.

The French, however, had started a doubt about the limits of their fishery in Newfoundland, and asserted that Point Riche, mentioned in the Treaty of Utrecht, was the same

as Cape Ray; and that the French limits on that side should, therefore, be extended as far as Cape Ray. After a long discussion at the Board of Trade, this contention was rejected by the Board on the clearest and most undeniable evidence. About this time the proceedings of the French caused great mischief. For example, at the close of 1764, the French had sent several ships of war to the Islands of St. Pierre and Miquelon, which had been partially ceded to them by the Treaty of Peace, and a sudden rupture of peaceful relations and an illegal use of these islands for purposes of war were feared instead of the Treaty right of an appropriation of these islands as places of shelter to French fishermen. *

By a proclamation dated the 7th October, 1763, Mr. Palliser, an active Governor of Newfoundland, carried into execution, on the coast of Labrador, which had been separated from Canada, and annexed to Newfoundland, a Plan of a Free fishery, to be carried on by ships of Great Britain, such as had been practised at Newfoundland. He was determined to maintain free fishing in the islands upon its original footing. He rejected the claims of exclusive fishing rights set up under grants from the French Governors of Canada, and even treated the American subjects of Great Britain as excluded from this fishery under the great Newfoundland Statute of 10 & 11 Will. III. The Board of Trade over-ruled the Governor as to the rights of British subjects in America, and referred the French grants to the Law officers of the Crown for their advice. The Law officers of the Crown rejected the French grants as illegal.

In 1775 was passed the Statute 15 George III., c. 31, with the design of forming and keeping alive the principle of a Newfoundland Fishery carried on from England. This Act was very unpopular in the island. It declared that the privilege of drying fish on the shores of Newfoundland should be enjoyed only by His Majesty's subjects arriving

at Newfoundland from Great Britain, or from one of the British Dominions in Europe. It also gave several bounties for encouraging the Newfoundland fishing industry.

The Board of Trade was abolished in 1782, and it was not till 1784 that a Committee of Council was appointed by His Majesty for matters of Trade and Plantation. In this interval, the war in America had come to an end, and the independence of the United States of America had produced a new condition of affairs in that part of the world. Treaties had to be made between Great Britain and the United States to meet the contingencies which had arisen.

Then, in 1788, by 28 George III., c. 35, His Majesty was authorised to make some regulations at Newfoundland to prevent the inconveniences that might arise from the competition of the English and the French in the Newfoundland Fishery.

By 29 George III., c. 53, it is declared that fish caught by British subjects, who did not go from the British Dominions in Europe, may not be landed or dried in Newfoundland. This last Act was occasioned by the people of Bermuda engaging in the fishery, and selling their fish to those who had a clear right to dry and cure fish on the island. By this provision, the design of the Statute of 1775, 15 Geo. III., c. 31, confining the fishery to ships going from Europe, was fully secured.

But the population of Newfoundland having largely increased in the end of the 18th century, a new grievance had arisen in consequence of the well-founded complaints against the administration of Civil Justice. Accordingly in 1789, a Court of Common Pleas, after the model of the old Court of Common Pleas in England, was set up by Admiral Milbanke, Governor of Newfoundland. Against this Court, the clamours of the West of England merchants were great and incessant. As the right of the Governor

to set up such a Court was more than doubtful, a Statute, 31 Geo. III., c. 29, was passed in 1791 for establishing a Court of Common Pleas in Newfoundland and was continued from year to year for a year or two.

Since the beginning of this century, the fishery, the population, the wealth, and the civilisation of Newfoundland have greatly increased. In 1855 a system of Representative Government was introduced into the island, of which St. John's is the chief town. During this later period, however, the fishermen of Newfoundland and Labrador have, on several occasions, been plunged into the direst poverty, and had to be relieved out of the Colonial Exchequer. On all hands, it is now clear that the increase of the population will necessitate a greater agricultural, mining and industrial development of the island. Unfortunately, however, the most effective steps for such development cannot be adopted, in consequence of the opposition of the French Government by their maintaining exclusive Fishery rights, which, the French say, they indisputably hold by and under the Treaties to which I am about to refer. Before I proceed to make the necessary quotation from those Treaties, I wish to sum up the results of the foregoing historical statement. I hold that I have proved :

1. That England, with minor exceptions, from its discovery in 1497, has always held the sovereignty of Newfoundland.
2. That, from the Treaty of Utrecht till the present time, she alone has exercised, and now exercises supreme power and authority in the island and all its dependencies.
3. That, before the Treaty of Utrecht, the Portuguese, Spanish and French nations had acquired certain fishing rights in Newfoundland.
4. That, at the date of that Treaty, two opposing interests were at work in Newfoundland, and that one of them did everything to prevent the island being occupied and

colonised, and that the other did everything to occupy and colonise it.

5. That, in the last mentioned struggle, the colonists had practically succeeded in all their aims, and been created the supreme local Judges of their own future destiny.

6. That, at the date of the Treaty of Utrecht, the London and Western English Merchants had Royal Charters to fish and to dry fish on the coast of Newfoundland, from Cape Bonavista to Cape Ray ; that is to say, to the same extent as was granted to the French by the Treaty of Utrecht.

I now proceed to lay before the readers the words of the Treaties relating to the Newfoundland fisheries between Great Britain and France. The words of these Treaties, and also of the communications emanating from the French Foreign Office and the Embassy in London, will, I think, be most conveniently given as a general rule, from the authorised translation in the *Blue Books*.

II.—TREATIES.

(1.) *Treaty of Utrecht, 1713.*—By the Treaty of Utrecht between Great Britain and France, in 1713, it was agreed upon, by the 13th Article, as follows : “ The island called Newfoundland, with the adjacent islands, shall from this time forward, belong of right wholly to Great Britain.” “ Moreover it shall not be lawful for the subjects of France to fortify any place in the said Island of Newfoundland, or to erect any buildings there, besides stages made of boards, and huts necessary and used for drying of fish, or to resort to the same island beyond the time necessary for fishing and drying of fish. But it shall be allowed to the subjects of France to catch fish and to dry them on land in that part only, and in no other besides that, of the said Island of Newfoundland, which stretches from the place called Cape Bonavista to the northern point of the said island, and from thence running down to the

western side, reaches as far as the place called Point Riche. But the island called Cape Breton, as also all others, both in the mouth of the River St. Lawrence and in the gulf of the same name, shall hereafter belong of right to the French, and the most Christian King shall have all manner of liberty to fortify any place or places there."

Treaty of Paris, 1763.—In 1763, by the Treaty of Paris between Great Britain and France, it was agreed upon by the 5th Article that this liberty of the subjects of France of fishing and drying on a part of the coasts of Newfoundland was renewed and confirmed, except, as after mentioned, as to the Island of Cape Breton, and the islands and coasts in the mouth and in the Gulf of St. Lawrence, as follows: "His Britannic Majesty consents to leave to the subjects of the most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at the distance of three leagues from all the coasts belonging to Great Britain, as well as those of the continent as those of the islands situated in the said Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton out of the said gulf, the said subjects of the most Christian King shall not be permitted to exercise the said fishery, but at the distance of fifteen leagues from the coasts of the Island of Cape Breton, and the fishery on the coasts of Nova Scotia or Acadia; and everywhere else out of the said gulf, shall remain on the foot of former Treaties." Further, by Article 6 of the same Treaty, it is declared that "the King of Great Britain cedes the Islands of St. Pierre and Miquelon in full right to His Most Christian Majesty, to serve as a shelter to the French fishermen; and His Most Christian Majesty engages not to fortify the said islands, to erect no building on them, but merely for the convenience of the fishery; and to keep upon them a guard of fifty men only for the police."

(3.) *Treaty of Versailles, 1783.*—By the Treaty of Versailles, in 1783, between Great Britain and France, it was agreed upon, by the 4th Article, that the British rights to the Island of Newfoundland and the adjacent islands, except the Islands of St. Pierre and Miquelon, which were ceded in full right by this Treaty to the King of France, should be maintained. It was also agreed upon, by the 5th Article of this Treaty, as follows:—"His Majesty the Most Christian King, in order to prevent the quarrels which have hitherto arisen between the two nations of England and France, consents to renounce the right of fishing, which belongs to him in virtue of the aforesaid Article of the Treaty of Utrecht, from Cape Bonavista to Cape St. John, situated on the eastern coast of Newfoundland, in fifty degrees North latitude; and His Majesty the King of Great Britain consents, on his part, that the fishery assigned to the subjects of his Most Christian Majesty beginning at the said Cape of St. John, passing to the north, and descending by the western coast of the Island of Newfoundland, shall extend to the place called Cape Ray, situated in forty-seven degrees fifty minutes, North latitude. The French fishermen shall enjoy the fishery which is assigned to them by the present Article, as they had the right to enjoy that which was assigned to them by the Treaty of Utrecht." Further, by Article 6 of the Treaty of Versailles, it was agreed upon that, "with regard to the fishery in the Gulf of St. Lawrence, the French shall continue to exercise it, conformably to the 5th Article of the Treaty of Paris."

To the Treaty of Versailles there are appended Declarations by the Duke of Manchester and M. Gravier de Vergennes, the Ministers acting on behalf of the Kings of Great Britain and France, for the purpose of ensuring the execution of the Treaty, and of preventing disputes in regard to these fishery rights thereafter. As the Declaration of His Britannic Majesty contains the vital terms of

these two Declarations, and was accepted by the King of France as satisfactory, I shall here quote the material parts of the British Declaration. These parts are:— “ To this end, and in order that the fishermen of the two nations may not give cause for daily quarrels, His Britannic Majesty will take the most positive measures for preventing his subjects from interrupting, in any manner, by their competition, the fishery of the French, during the temporary exercise of it, which is granted to them upon the coasts of the Island of Newfoundland ; but he will, for this purpose, cause the fixed settlements which shall be formed there to be removed. His Britannic Majesty will give orders that the French fishermen be not incommoded in cutting the wood necessary for the repair of their scaffolds, huts, and fishing vessels.

“ The Thirteenth Article of the Treaty of Utrecht, and the method of carrying on the fishing, which has at all times been acknowledged, shall be the plan upon which the fishery shall be carried on there. It shall not be deviated from by either party, the French fishermen building only their scaffolds, confining themselves to the repair of their fishing vessels, and not wintering there ; the subjects of His Britannic Majesty, on their part, not molesting in any manner the French fishermen during their fishing, nor injuring their scaffolds during their absence.

“ The King of Great Britain, in ceding the Islands of St. Pierre and Miquelon to France, regards them as ceded for the purpose of serving as a real shelter to the French fishermen, and in full confidence that these possessions will not become an object of jealousy between the two nations, and that the fishery between the said islands and that of Newfoundland shall be limited to the middle of the channel.”

4. *The Treaty of Paris, 1814.*—By the Treaty of Paris in 1814, between the Kings of Great Britain and France,

it was agreed upon, by the 8th Article, that " His Britannic Majesty, stipulating for himself and his allies, engages to restore to His Most Christian Majesty, within the time which shall be hereafter fixed, the colonies, fisheries, factories, and establishments of every kind, which were possessed by France on the 1st of January, 1792, in the seas and on the Continents of America, Africa and Asia with the exception" of the islands and dependencies and places therein specially mentioned, but which do not affect the questions involved in the present discussion. Further, by Article 13 of this Treaty it was expressly stipulated that " the French right of fishery upon the Great Bank of Newfoundland, upon the coasts of the island of that name, and of the adjacent islands in the Gulf of St. Lawrence, shall be replaced on the footing on which it stood in 1792." The Treaty of Paris of 1815, generally speaking, maintains the Treaty of Paris of 1814. It neither adds nor takes away any of the French fishery rights on the coasts and Island of Newfoundland. It leaves them as they stood in 1792.

(5.) *Conclusions Derived from French Treaty Rights.*—I have now gone through the whole of the Fishery Treaty rights of France on the coasts and Island of Newfoundland. I submit that they are the following:—

1st. The island called Newfoundland, with the adjacent islands, except the Islands of St. Pierre and Miquelon, belongs absolutely to Great Britain.

2nd. The Islands of St. Pierre and Miquelon belong to France, but were ceded for purposes of shelter only, and without the right to fortify.

3rd. France has no right to fortify any place in the Island of Newfoundland, and no right to erect any buildings there, except stages made of boards, and huts necessary and usual for the drying of fish, or to resort to the said island beyond the time necessary for fishing and for drying of fish.

4th. That the subjects of France are allowed by Great Britain to catch fish, and to dry them on land on the coast of Newfoundland, beginning at Cape St. John, passing to the north, and descending to the western coast as far as Cape Ray.

5th. That the subjects of France have the liberty to fish (1) in the Gulf of St. Lawrence at the distance of three leagues from all the coasts belonging to Great Britain; and (2) on the coasts of the Island of Cape Breton, out of the said gulf at the distance of fifteen leagues from the coasts of the Island of Cape Breton; and (3) on the coasts of Nova Scotia and everywhere else out of the said gulf without any restriction as to limits, and, in fact, to the same extent as British subjects.

6th. That the subjects of France have the power to build scaffolds on the Newfoundland coast specially conceded, and to repair their fishing vessels, but not to winter there.

7th. That the method of carrying on the fishery rights, conceded to France by Great Britain, was to be in accordance with the plan upon which the fishery shall have been at all times carried on there, and was to be exercised under the sovereignty and jurisdiction of Great Britain.

After the Treaty of Paris of 1783, an Act of the British Parliament was passed in 1788, 28 Geo. III., c. 35, to enable His Majesty to make such regulations as might be necessary to prevent the inconvenience which might arise from the competition of His Majesty's subjects and those of His Most Christian King in carrying on the fishery on the coasts of the Island of Newfoundland. This Act was passed on the preamble of the aforesaid Treaty of Utrecht in 1713, the Treaty of Paris in 1763, and the Treaty of Versailles in 1783. It then enacts "that it shall and may be lawful for His Majesty, his heirs and successors, by advice of Council, from time to time, to give such orders and instructions to the Governor of Newfoundland,

or any officer or officers on that station as he and they shall seem proper and necessary to fulfil the purposes of the definitive treaty and declaration aforesaid,"—i.e., of 1783,—“and, if it shall be necessary to that end to give orders and instructions to the Governor or other officer or officers aforesaid, to remove or cause to be removed, any stages, flakes, train vats or other works whatsoever for the purpose of carrying on the fishery, erected by His Majesty's subjects on that part of the coast of Newfoundland which lies between Cape Saint John, passing to the north, and descending by the western coast of the said island to the place called Cape Ray, and also all ships, vessels and boats belonging to His Majesty's subjects, which shall be found within the limits aforesaid; and also, in case of refusal to depart from within the limits aforesaid, to compel any of His Majesty's subjects to depart from thence; any law, usage, or custom to the contrary notwithstanding.” It then contains enactments authorising the imposition of a penalty of £200 on every person refusing obedience to such orders.

This Statute was repealed in 1871, in the revised edition of the British Statutes. But its repeal does not in any degree affect the binding force of the Treaty of Versailles in 1783; of Paris in 1763; or of Utrecht in 1713.

IV.—ANGLO-FRENCH CONVENTION OF 1884 AND PREVIOUS NEGOTIATIONS.

In a despatch by Lord Derby, as Colonial Secretary to Governor Glover, on the 12th June, 1884, published in a *Blue Book* for 1886, there is a long and interesting statement of the various negotiations which had taken place between the British and French Governments as to the Newfoundland Fisheries, and which culminated in the Anglo-French Conventions of 1884-5, and which were ultimately rejected. A brief *résumé* of this statement will give

an indication of the past efforts made for an amicable settlement down to 1885, and may help us to see how an amicable settlement is still possible, and how far past failures may be avoided.

In 1844, negotiations were entered upon between the British and French Governments for the separation of the British and French rights of fishing in Newfoundland, and for the cession of the French claims of exclusive fishery on certain portions of the island, and also for permission to sell bait at St. Pierre by the British to the French. A settlement was then nearly effected. But, in consequence of counter-proposals being made by the French, the negotiations fell to the ground in May, 1847. In 1851, negotiations were again renewed, and new demands were made by the French for the purpose of obtaining the right to purchase, and fish for bait on the south coast of Newfoundland. These demands were not thought to be admissible, and the negotiations bore no fruit. Then questions of exclusive and concurrent right of fishing were raised, and counter-proposals were made in 1855, and were supposed to be approved by Newfoundland. These negotiations were terminated by a Convention on the 17th January, 1857, and certain exclusive rights of fishing and harbourage were given to the French on the east coast; and the British and the French were to have concurrent rights on certain parts of the west. By this Convention, a limited right of jurisdiction was granted to France, and French naval officers were to have power to enforce the French exclusive right of fishing by the expulsion of vessels or boats attempting a concurrent fishing in the event of there being no British cruising-vessel in sight, or known to be present within a distance of fifteen marine miles. The French naval officers were likewise entitled to take such measures as were required to put the French fishermen in full possession of their exclusive rights of fishing under the

Convention. Under this Convention, the French would have obtained the exclusive right of fishery on the north extremity and the north-east coast of Newfoundland, and also on five points on the western shore of the island. This Convention was abandoned in consequence of the opposition of the people and Government of Newfoundland. In 1859, a mixed British and French Commission was appointed to verify certain alleged infractions of the Anglo-French Treaties as to Newfoundland, and a report was made in 1860. The negotiations which followed on this report were finally abandoned, mainly in consequence of the objections raised by the Government of Newfoundland against the terms of the 4th and 15th Articles of the joint instructions proposed to be issued to the British and French naval officers. The 4th Article has reference to the punishment of offenders in fishing disputes: and the 15th to the removal of such buildings on the French shore as might interfere with the fishing of the French. Vital questions emerged during these negotiations as to alleged French Sovereign and Territorial claims, which were repudiated by the British Government. These negotiations also came to nothing. Negotiations were again renewed in October, 1874, and were continued in 1875 and 1876, and yet no settlement was effected. During these negotiations, the British Government were aided by the Premier (Carter) of Newfoundland, and the negotiations were commenced on the basis of the resolutions of the 23rd April, 1874, adopted by the Newfoundland House of Assembly, and concurred in by the Legislative Council. They embraced the following stipulations: 1. The establishment of a Joint Naval Commission for fishery disputes; and, if no agreement, a reference was to be made to the respective Governments. 2. The continuance of certain British settlements. 3. No building, which had been erected for five years, was to be removed as interfering

with the French fishery, without compensation to be determined by the Joint Commission. 4. The Commissioners were to determine the boundary of the French fishery, and the British Newfoundlanders were to have the salmon fishery exclusively. And 5. The British might erect naval and military works, wharves and buildings for trading and military purposes. Inasmuch as the Newfoundland and Colonial Authorities were not prepared to enlarge the French right of fishery, but would merely consent to concessions as to the selling and purchasing of bait on the south coast of Newfoundland, the negotiations were again without result. Then, after a lapse of five years, a Joint British and French Commission was appointed in 1881. With the assistance of Sir William Whiteway, who was then in London, the Home Government formulated proposals for the appointment of a Delimitation Commission to define and allot some parts of the Newfoundland shore, and to decide on the portions of the so-called French shore, to be released from former Treaty stipulations, and mark out the rights of French vessels in the Newfoundland harbours; and also for the appointment of a Joint Commission, to be named the Fishery Commission, which was to act on the Joint Instructions of Britain and France, and was to see that the fishery rights of neither party were interfered with. This mixed Commission was to have power to inflict punishment on offenders by fines and seizures of property. By these proposals, the French were to have power to leave their boats in Newfoundland during the winter, and to purchase bait on the south coast at such times as the British could purchase bait. The French Commissioner stated that his Government would never agree to the principle of the British and French occupying the same harbours and the same fishing grounds. Again the negotiations came to an end without result. Then, lastly, came the Conventions of 1884 and 1885. Both these

Conventions were to the same effect, except in regard to two points, which will be afterwards mentioned. The Convention of 1884-5 contained—1. An extensive admission of the British claims over the so-called French shore, as shewn on a plan prepared by a Joint Delimitation Commission, except as regards certain French fishing settlements. 2. A withdrawal of the French claims of exclusive fishery. 3. A withdrawal of the French claims to fish in Newfoundland rivers. And 4. A stipulation for existing fishing settlements to continue. By this arrangement the French were not to raise objections to the formation of establishments for mining, or to the development of industry other than fishery, on the greater part of the so-called French shore; and the French were to retain the full right, as defined by Treaties, of fishing, drying, and curing fish, as well as cutting wood in all parts, except in enclosed property, as they should find necessary for their fishing stages, huts, and fishing boats. The principal exceptions to this general abandonment by the French were on the coast near Point du Sud on the west, and near Point Riche—and from the Baie des Castors to the Nez des Sauvages, and various other points on the north-east, and specially on the north of Newfoundland.

In the despatch to which I have referred, Lord Derby states that he did little else than recognise the acts of authority exercised by the French cruisers in the waters over which the French fishery rights extended. He also states that the British Government thought it was reasonable that the French cruisers should exercise such powers as were necessary for the defence of their rights. He indicated his own opinion that the extension of French naval superintendence might be obviated by enlarged British naval supervision on the Newfoundland coast. The agreement to which his Lordship refers is dated the 26th April, 1884, and was followed by a Delimitation Commission, which reported

on 23rd July, 1884, and was followed by a New Agreement or Convention, dated the 14th November, 1885, modifying the Agreement of 1884 (1) as to the French Guardians of Ports, and (2) as to wharves for the development of Trade. Thereafter, a correspondence ensued between the British Colonial Office and the Newfoundland Government in 1884, 1885, and 1886, in which the Newfoundland Government regreted that the British Colonial Office had not secured the rights contended for by the Newfoundland Government as set forth in the Resolutions of the Local Legislature of the 23rd April, 1874, to which the Newfoundland Government adhered in July, 1884 (*vide Blue Book*, of 1886). Further, on the 6th February, 1885, (*vide Blue Book, Id.*) the Newfoundland Government informed the Home Government that the Local Legislature would not take a favourable view of the new Agreement, unless the French opposition to the development of Newfoundland was abandoned. Still further, on the 26th July, 1886, Colonel Stanley, Colonial Secretary, wrote to the Officer administering the Government of Newfoundland requesting him to submit the new Agreement to his Ministers, and hoping that it would be found acceptable to the Legislature of Newfoundland, and that the necessary steps would be taken to have it sanctioned by the Local Legislature, as was required before its final acceptance by the Home Government. This last effort at an amicable settlement also came to an end without result.

V.—NEWFOUNDLAND'S OBJECTIONS TO THE CONVENTIONS OF 1884-5, AND ARGUMENTS FOR AND AGAINST BAIT ACTS.

The principal objections entertained by the Joint Select Committee of the two Houses of the Newfoundland Legislature were these:—

1. The insufficient definition of the concurrent rights of fishery on the part of British subjects with the French. .

2. The powers given to the Commanders of French cruisers, and that these powers ignored the Local Tribunals of Newfoundland and gave jurisdiction contrary to the principles and processes of British Tribunals of Justice.

3. The provision allowing to the French the right to purchase bait. On this, the chief objection, the Committee held that the Colony was "called upon to surrender its right to restrict the export, or sale, of bait, thereby resigning the control of this the most vital necessity for the prosecution of the cod fishery, and binding the Colony to furnish our bounty-fed rivals, in the future, with an unlimited supply of this important requisite, to enable them to drive out our most important staple from the markets of the world." With the high bounties paid to French fishermen, the Newfoundland people held that they could not compete with the French on fair terms.

The Legislative Council had another objection to the Convention, on the ground that it interfered with the development of the Colony, and seriously affected the stability and maintenance of British interests in North America. The Council also objected to the Convention; because (1) Articles VIII. and IX. did not withdraw the exclusive right of fishing claimed by the French; and (2) the concurrent right of British fishermen to fish everywhere on the coast between Cape St. John and Cape Ray was only conditionally admitted.

Some Members of the Council were prepared to vote for the Convention of 1885, provided the French would agree to abandon, not later than 1891, all bounties on Newfoundland fish exported to foreign countries, and a satisfactory arrangement could be arrived at as to "obstruction" and "interference" on the French shore. But the Council would not agree to accept the Convention with such modifications. In consequence of the hostile attitude of the above Joint Select Committee, the Governor of Newfoundland

prorogued the Newfoundland Legislature on the 19th May, 1886. The Committee positively and emphatically refused to sanction the arrangement, with or without the clause as to bait, unless concessions were made by the French in regard to bounties and "interruption," and as to charges made against British fishermen on board French cruisers. The French would make no concessions as to the bounties ; and, therefore, there was no basis for further negotiations. At the request of the Governor, no vote was taken by the Committee, which would have reported adversely to the Arrangement, and which was allowed to sit during the recess with a view to reporting to the Legislature in the following session. In communicating the state of affairs as to the Anglo-French Arrangement, the Governor wrote to Lord Granville, on the 25th May, 1886, making a long and important statement, and informed his Lordship that : "By a very considerable proportion, probably a large majority of the people, the rights of the French, as the Treaty shews, are not at all understood, and the assertion of them, in any way, is regarded as a wrong. The population which has grown up on this shore since the Declaration of 1783, now amounting to some thousands, look upon it as an intolerable hardship that they should be obstructed in, much less prevented from, fishing on waters their own, and to many of them their native coast ; and the acts, authorised and unauthorised, which have, in the course of years, been done by the French, in the assertion of their rights, have come to be regarded simply in the light of injuries." This is an aspect which the Imperial Government will have seriously to face, and which can be effectually faced only in one way, viz., by the extinction of the French rights in Newfoundland, with the consent of the French people.

To enable the Newfoundlanders to carry out their views of self-protection against French bounties, the local Legislature

passed an Act in 1886 "to regulate the exportation and sale of herring, capelin, squid, and other bait fishes," and they strongly recommended its approval by the Imperial Government. But it never received the sanction of the then Home Government; because it was in violation of the Liberal principles of Free Trade, and of the pretensions of the French people, who insisted on their right to grant bounties to their fishermen, but refused to allow the Newfoundlanders to protect themselves by what were practically countervailing duties. In 1863, the Duke of Newcastle, Secretary for the Colonies; and also in 1885, Lord Granville, held that the Home Government would not sanction any act, directly or indirectly, prohibiting the sale of bait. This Bait Act of 1886 enacts that no person shall take bait-fishes for exportation, without obtaining a special license from the Receiver-General of the Colony, issued by the authority of the Governor in Council, and countersigned by the Colonial Secretary of the Colony. It inflicted heavy fines, or severe imprisonment, for acting in violation of the provisions of the Act, and that by way of summary trial before Stipendiary Magistrates, subject to a right of Appeal to the Supreme Court. It also declared that the rights and privileges granted by Treaty to the subjects of any State or Power in amity with Her Majesty should not be affected by the Act. It will thus be seen that this Act was intended to be protective, and was susceptible of considerable modifications so as to keep the law of the Colony and the Treaty obligations of the Mother Country in harmony, as the latter might exist at different times, and in regard to different foreign countries. In support of this Act, a petition, dated the 18th May, 1886, was presented by the Legislative Council of Newfoundland to Her Majesty's Principal Secretary of State for the Colonies. From this petition I extract the following important and pregnant words:— "We have been informed that, unless the Legislature assent

to the arrangement, recently entered into between Great Britain and France, regarding the French claims, on a part of the coast of this island, any Acts prohibiting or regulating the export of bait-fishes will be disallowed by the Parent Government. We are unwilling to believe that such an extreme course would be adopted by the Mother Country, for no better reason than that a nation, supposed to be a friendly one, demands a concession from this Colony which, if granted under the present system of French bounties, means starvation to our fisherinen, ruin to our mercantile and industrial classes, and bankruptcy to the Colonial Exchequer. The result that would ensue to Great Britain by thus sacrificing 200,000 British subjects in this most ancient and loyal Colony, by a course of coercion exercised towards a people, to whom self-government has long been accorded—a course, too, the principle of which has been emphatically repudiated by all political parties in England and by her most eminent statesmen—would be to unduly increase the navy of a rival power, necessarily involving a corresponding addition to the British Navy, and increased taxation to the British Taxpayer."

On the 2nd February, 1887, the Marquis of Salisbury wrote to Viscount Lyons, the British Ambassador at Paris, that, while the British Government held that they were at full liberty to sanction, or reject, the Newfoundland Local Bait Act of 1886, yet they would not sanction it during the then succeeding fishing season of 1887. In the previous month, on the 14th January, the Governor of Newfoundland had written to the Colonial Secretary, Mr. Stanhope, that the rejection of the Local Bait Act would, in his opinion, be nothing less than a calamity to the interests of the Colony. He held that Newfoundland was essentially dependent on its fisheries, and could not, for a long time, if ever, be primarily dependent on its agriculture or mining. He states that the Government

had, during the winter then passing, been obliged to expend £150,000 on relief works, which were largely unremunerative, to save the people from starvation; and that, if such expenditure should become normal, as many experienced persons feared it might, the situation of the Colony would be grave and alarming. He further stated that he was doubtful whether, if an Act, effecting the same purpose as the Local Bait Act, by means of prohibitive duties on the exportation of bait, had been submitted, he would have been entitled, under his then existing instructions, to have refused his assent to such prohibitive Act. He dwelt on the Imperial assent given to the Canadian Local Bait Act; and suggested that, if there are Imperial considerations in favour of refusing to sanction the Newfoundland Bait Act, the Colonists should not bear the whole burden, and were entitled to compensation from the Imperial Government for the right withheld. He added that the interests of the Canadians and the Newfoundlanders were identical in this matter, and would soon be seen to be so. He then expressed an opinion that the Arrangement of 1885 could never be accepted by the Legislature of Newfoundland, so long as the Bait Clause remained in it, and the French bounties continued to be paid. He concluded his letter by expressing the hope "that the vital interests of 200,000 British subjects will not be disregarded out of deference to the susceptibility of any Foreign Power, and this especially when the privilege which that Power desires to retain cannot be pretended to be a matter of right, but is a benefit which may be lawfully withdrawn, as in the nature of a tenancy at will, and may now be justly withdrawn as being used for the infliction of fatal injury on those who have hitherto permitted its enjoyment." This last letter was answered by Sir Henry Holland (now Lord Knutsford), then Colonial Secretary, on the 3rd February, 1887. He referred to the negotiations which had taken

place between the French and ourselves since 1857, and to the Resolutions in 1867 and 1874 by the Legislative Council and House of Assembly in Newfoundland, agreeing to a clause allowing the French to purchase bait at such times as British subjects might lawfully take the same ; and to the fact that the Colonists had not objected to the Bait Clause in the Paris Arrangement of 1884-5 until the year 1885, when it was submitted to the Colonial Government for final approval. He also pointed out the difficulties to an entire departure from the policy hitherto upheld by us, and that Her Majesty's Ministers were unable to advise the Queen to allow the Bait Bill to come into operation in respect of the approaching fishing season, it would not at present be submitted for Her Majesty's confirmation. (*Vide Blue Book*, 1886, p. 93.) He also asked for further information as to the effect of the French bounties in depressing the fishing industry of the Newfoundland Colonists. On the 21st February, 1887, both Houses of Legislature in Newfoundland passed a Bait Act in the same terms as the Bait Act of 1886, with the exception of a new clause, suspending the operation of the Act until its allowance by Her Majesty by proclamation. In the interval between the passing of the Acts of 1886 and 1887, a very strong feeling was expressed in the local press against the Mother Country, and some of the local newspapers even advocated the annexation of the Colony to the United States of America. In October, 1886, the Newfoundland Government appointed Sir Ambrose Shea, as Commissioner, to proceed to England to explain their views as to the vital importance of the Bait Act in regard to the welfare of the Colony.

After the Governor's last despatch, already referred to, I am not at all surprised that His Excellency gave his sanction to this Local Act, and threw the whole responsibility for its rejection, or suspension, on the Imperial Government. A new Address to the Colonial Secretary by the Legislative

Council urging the confirmation of this Act was adopted and was forwarded to England.

This contained much stronger language than the Address of 1886. It complained that the interests of the Colony were sacrificed to French interests; that British colonial interests were subordinated to foreign interests; that the serious changes in the Newfoundland fisheries had, it was thought, been previously and fully explained; that the Colony lost £250,000 a year by the reduced value of their staple industry, and under conditions menacing its still further serious decline.

On the 12th April, 1887, the Governor-General of Canada wrote to the Colonial Secretary, Sir Henry Holland, that the Committee of the Privy Council of Canada objected to the Newfoundland Bait Act as injurious to the Dominion; and urged that, if the Bill should be allowed to come into operation, it should apply only to foreign vessels, and not to those of Great Britain or the British Colonies. The Committee expressed a strong opinion of the unfair and inequitable way in which Canadian ships and owners and fishermen would be dealt with on the Newfoundland coast, as compared with the manner in which Newfoundland ships, owners and fishermen, were treated on the Canadian coast. Further, the Canadian Minister of Justice condemned the Bill, because of the unusual, oppressive, and dangerous scope of its provisions. (*Vide Blue Book, 1890, p. 106.*) On the 27th April, 1887, Sir Robert Thorlburn, the Premier of Newfoundland, repudiated these interpretations placed on the Newfoundland Bait Act, and asserted that it was within the power of the Newfoundland Legislature to pass the Act, which was of universal application. To meet the well founded objections of the Canadian Government, the Newfoundland delegates, then in England, were willing to give assurances that the Bait Bill was not intended, and

would not be allowed, to operate against the Canadian Dominion, and "was passed to protect the bait fisheries on the Newfoundland coast against their use by foreigners, whose bounty-assisted operations have been disastrous to British interests." (*Vide Blue Book*, 1890, p. 108.) On the 19th March, 1887, the Governor of Newfoundland wrote to the Colonial Secretary that an Executive Council of his Ministers had on that day resolved not to take any legislative or executive action "either for the removal of the lobster factories complained of by the French Government, or for the prohibition of the use of cod traps on the coast where the French have Treaty rights; and that, in answer to his remonstrances against their passive and inactive policy, they assured him that the constituencies would support them in no other policy." Here was a pleasant prospect for the Governor, the Imperial Government, the French Republic, and all concerned. On the 7th May, 1887, Lord Salisbury authorised the Colonial Secretary to inform the Newfoundland delegates that Her Majesty's sanction would be obtained to the Bait Bill of 1887. Accordingly a communication was made by the Colonial Secretary to the Administrator of Newfoundland that the Queen would be advised to sanction the Bill, and desiring that the requisite Proclamation, bringing the Act into force, should not come into force till after the fishing season of 1887. Her Majesty, on the 12th July following, was pleased, by and with the advice of her Privy Council, to declare her official confirmation of the said Act.

Fully two months before that date, on the 4th May, a Resolution, forwarded to the Governor on the 22nd June, was passed by the Legislative Council, and the House of Assembly of Newfoundland declining to assent to the Paris arrangement of 1885. Of course, this Resolution was known immediately by the Governor, and very soon afterwards by the Imperial Government. How far it had anything

to do with the Ratification of the Local Bait Act of 1887, does not appear from the *Blue Book*. But that it had a great effect I do not doubt for a single moment. On the 10th August following the Colonial Secretary wrote to the Governor, and acknowledged receipt of the Resolution of the Newfoundland Legislature. He stated that the Legislature was evidently labouring under misapprehensions as to the real nature of the Paris arrangement, and instanced several points in support of his opinion to that effect.

On the 19th October, 1887, Lord Salisbury wrote to the French Chargé d'Affaires in London that the Bait Act "had received the Royal confirmation, and the Government of Newfoundland have signified their intention of putting it in force during the next fishing season." He concludes by stating, "I have to add that the Government of the Colony have reported, by telegraph, that licenses will be freely granted to British subjects on that portion of the Newfoundland coast to which French Treaty rights extend, to catch and sell bait on the spot, but they will not be permitted to engage in the exportation of bait to St. Pierre or elsewhere. On the other parts of the coast, the Act will be rigorously enforced." Subsequently, on the 20th October, 1887, the Governor-General of Canada wrote to Governor Blake, of Newfoundland, wishing to know "the nature of the Regulations under which it is proposed that Canadian subjects shall enjoy the rights of fishing and procuring bait in the territorial waters of Newfoundland."

By the enforcement of the Bait Act of 1887, matters did not improve between Newfoundland and France, and the French Fisheries on the Newfoundland coast and Banks shewed a marked decrease in productiveness. The truth is that, for two years, the British and French naval officers, exercising the utmost patience and discretion,

prevented several serious outbreaks between the British and French Fishermen. This condition of affairs brought about the *modus vivendi* of 1890, between Great Britain and France.

VI.—MODUS VIVENDI OF 1890.

On the 21st January, 1890, the Secretary of the French Embassy in London, M. Jusserand, called at the Foreign Office, and said that, as the arbitration which had been proposed as to the lobster fishery could scarcely be brought to a close before the commencement of the next fishing season, it seemed desirable to arrive at some *modus vivendi* for that season only, and pending the settlement of the question at issue. He accordingly communicated a sketch of the basis of such an arrangement, and asked for an early reply as to whether it would be acceptable. This sketch was communicated to Lord Knutsford on the following day, and was to the following effect :

“ The questions of principle and of respective rights being entirely reserved on both sides, the maintenance of the *status quo* might be agreed upon on the following basis :—

“ Without France demanding at once a new examination of the legality of the installation of the British lobster factories on the French shore, it shall be understood that there shall be no modification in the positions occupied by these establishments as on the 1st July, 1889.

“ On the other hand, no new concession of a fishery of lobsters shall be accorded this year by the French Government on the fishing grounds occupied by British subjects previously to the 1st July, 1889.

“ Whenever any competition may arise in respect of the lobster fishery between the French and British fishermen, the commanders of the two naval stations shall proceed, on the spot, to a provisional delimitation of the lobster fishery

grounds, having regard to the situations acquired by the two parties.

“N.B.—It is well understood that this arrangement is quite provisional, and shall only hold good for the fishing season which is about to open.”

The terms of this proposed Agreement were communicated by Lord Knutsford to the Governor of Newfoundland on the 28th January, 1890, when his Lordship concluded his telegram in these words: “To this Agreement I conclude there is no objection.”

Telegrams were exchanged between the Governor of Newfoundland and the Colonial Secretary on the 30th January and the 8th February, 1890, respectively, as to the meaning of the proposed *modus vivendi*; but, as they do not affect the ultimate determination, they need not be here stated in detail. On the 12th and 13th February, 1890, two telegrams were received by Lord Knutsford from the Governor of Newfoundland. I give the words of the second telegram, which are as follows:—“My Ministers strongly contest the French claims to lobster fishing; but desire to meet the wishes of Her Majesty’s Government as to a *modus vivendi* for this season only. They desire that the proposed date may be extended to the 1st January last, otherwise a great hardship must ensue, as a large amount of money has been invested in erecting new factories.” Accordingly, a communication was made on the 14th February by the Colonial Office to the Foreign Office, suggesting that the recommendation of the Colonial Government as to the date of the new arrangement should run from the 1st January, 1890. On the following day, 15th February, a communication was made by the Foreign Office to the Colonial Office that this recommendation had been adopted, and an Amended Draft was prepared to this effect, proposing to give the French a corresponding advantage. To this Amended Draft the

Secretary of the French Embassy objected, and a new Amended Draft was prepared fixing the date as at the 1st July, 1889, and that there might be substitutions of lobster factories for the then existing 'ones, and new lobster fisheries established, with the consent of the commanders of the two naval stations. To this Amended Draft Lord Knutsford agreed on the 3rd March, 1890.

On the 17th February, 1890, the Governor of Newfoundland wrote to the Colonial Secretary that his new Ministers all evinced a desire to meet the wishes of Her Majesty's Ministers as to the proposed *modus vivendi*, and believed that, in so doing, they would be supported by the Colony; but contended, as strongly as their predecessors in office, that the French were not entitled to fish for lobsters. After the receipt of this letter, the Colonial Office wrote, on the 8th March, 1890, to the Foreign Office, and suggested that the French Naval Officers should be instructed to act in a liberal spirit as to British lobster factories established since the 1st July, 1889,—or where preparations had been made for their establishment. On the 10th March, 1890, Lord Salisbury transmitted to M. Waddington a Draft *modus vivendi*, practically in the same terms as I have already quoted, but with modifications as to (1) the removal of lobster factories, and (2) the reciprocal establishment of new lobster factories; and stating that Her Majesty's Government was prepared to accept it as then forwarded. On the following day, M. Waddington wrote to Lord Salisbury that, on behalf of the French Republic, he agreed to the terms of the Draft *modus vivendi*, and held it to be binding for the ensuing fishing season of 1890. On the next following day, the Foreign Office requested Lord Knutsford to take all steps necessary to have the *modus vivendi* put into execution. Thereafter, on the same day, Lord Knutsford communicated, by telegraph, with the Governor of Newfoundland, sending him the text of the *modus vivendi*, and informing him that it had been

agreed to by the two Governments. Then, wonderful to relate, the Governor of Newfoundland telegraphed to Lord Knutsford, on the 14th March, 1890, that his Ministers objected to the terms of the *modus vivendi*. This communication was in these words:—"My Ministers strongly protest against what would, in *modus vivendi*, appear to be admission of concurrent rights of lobster-fishing, and are of opinion that this arrangement would be prejudicial to position of Newfoundland in future negotiations. They further contend that Imperial Government should bear expense of losses of those who have established factories since date 1st July. They consider that, as this *modus vivendi* has been concluded without their concurrence, it is not for them to advise as to giving notice to those whom it may affect." On the same day, Resolutions were passed by both Houses of the Legislature of Newfoundland, protesting against the *modus vivendi*; for the reasons communicated by the Governor to the Colonial Secretary. On the 18th March, 1890, the Colonial Secretary telegraphed that the Newfoundlanders were labouring under some misapprehensions as to the *modus vivendi*, and that some temporary arrangement was necessary for the next fishing season, and that all questions of principle were expressly reserved on both sides.

On the 21st March, 1890, Lord Knutsford wrote to the Governor of Newfoundland, recapitulating the steps taken in regard to the Premier, Sir William Whiteway, visiting this country to discuss the whole Fishery question; as to the steps taken in regard to the proposed *modus vivendi*; and then went on to state that: "The *modus vivendi* agreed to made no concessions of right to the French, neither does it, in any way, detract from the maritime or territorial rights of the Colony, and, therefore, does not infringe the assurance contained in the despatch from the Secretary of State (Mr. Labouchere) to

Governor Darling of the 26th March, 1857, which, it is presumed, is the assurance referred to in the Resolutions of the two Houses. That assurance was to the effect that the consent of the community of Newfoundland was regarded by Her Majesty's Government as an essential preliminary to any modification of their territorial or maritime rights." His Lordship rightly held that the *modus vivendi* did not militate against that assurance. If not, where is British Sovereignty in Newfoundland? Nowhere, I should think.

On the 26th March, 1890, Lord Lytton sent from Paris to Lord Salisbury an extract from the *Journal Officiel*, of the same date, containing a report of a question put to the French Minister for Foreign Affairs in the Senate, on the previous day, on the subject of the Newfoundland fishery, and of his Excellency's reply. After asserting that the French rights were absolute and exclusive, M. Ribot defended the new *modus vivendi* as being a temporary arrangement, to be followed, when it expired, by a renewal of negotiations with England, and he hoped that he would secure more favourable terms for French fishermen. Lord Lytton adds that a desire having been expressed for a fuller discussion of the whole question, M. Ribot accepted an interpellation, which was fixed for a month thence.

I may here remark, in passing, that M. Flourens and M. Spuller, the predecessors of M. Ribot at the French Foreign Office, all held that the French rights to the so-called "French shore" "were absolute and exclusive. (*Vide*, Report of an Interpellation in the French Chamber of Deputies in the *Journal Officiel*, of 20th January, 1890. *Blue Book, Newfoundland, ante*, pp. 315-331.)

On the 28th March, 1890, Lord Knutsford telegraphed to Lord Stanley of Preston, Governor-General of Canada, in answer to a question by his Ministers, that it was not probable "that new establishments," *i.e.*, lobster fisheries

or factories, by Canadians "can be allowed" on the Newfoundland shores where the French have Treaty rights.

On the 15th March, 1890, Resolutions were passed by the Legislative Assembly of Newfoundland, and assented to by the Legislative Council on the same day, in the following terms :—(1.) "That the Legislative Assembly has received, with surprise and alarm, the *modus vivendi* which has been concluded by Her Majesty's Government with the Government of France." (2.) "That the permission, in the *modus vivendi*, given to France to erect factories, is most objectionable, as appearing to indicate a right which really has no existence, and that it is in direct opposition to the position heretofore taken by Her Majesty's Government." And (3.) "That the Legislative Assembly must emphatically protest against the *modus vivendi*, as being calculated to seriously prejudice British fishing and territorial rights."

On or about 15th April, 1890, copies of the *modus vivendi* were forwarded "to the Commander-in-Chief on the North American and West Indian station for communication to the naval officers to be employed this season under Captain Sir Baldwin Walker, with instructions to act with patience and discretion in dealing with the questions which may arise between the British and French fishermen."

On the 17th April, 1890, the Governor of Newfoundland, telegraphed to Lord Knutsford, that a "Joint Committee of both Houses of Legislature, while strongly protesting against French claim to erect any lobster factory, would, only in deference to wishes of Her Majesty's Government for a *modus vivendi*, limited to this season, concur in proposals in your Lordship's telegram of the 8th February. Can it be accomplished?" On the 29th of the same month, Lord Salisbury, after communicating with the French Ambassador in London, wrote to Lord Knutsford that no formal alteration could be made in the *modus vivendi*. Accordingly, on the 2nd May, 1890, a telegram to that effect

was sent by Lord Knutsford to the Governor of Newfoundland.

I conclude this branch of my Article by holding—1st. That the *modus vivendi* was a reasonable arrangement as a temporary expedient; 2ndly. That the Newfoundland Government was not justified in refusing to agree to it in its final form; and 3rdly. That the Imperial Government should not, any longer, run the risk of getting into war with France on this subject, and should resolutely press forward, by Compromise, Arbitration, or final Treaty, towards a final settlement of the whole dispute.

I must now proceed to the next branch of my subject. But before I go into further details from the *Blue Book* of 1890, I ought to observe here that, as far as I can make out and follow the course of events from 1884 to 1890, the Conventions of 1884-5, and subsequently the *modus vivendi* of 1890 were generally, as a matter of fact, and in the general interests of peaceful relations, carried out by the British and French Commanders who were stationed at Newfoundland.

VII.—THE OFFICIAL CORRESPONDENCE, 1884-90, AS TO FRENCH CLAIMS TO EXCLUSIVE FISHERY AND ALSO TO LOBSTERS.

I must content myself with summarising the contents of the recently published *Blue Book* on the Newfoundland Fisheries, and with giving extracts here and there to illustrate the views entertained by the respective Governments. As nearly as possible, I shall give them exactly according to date. But I have had much difficulty in keeping to this order, because the general question and the lobster question are inextricably mixed up.

From this official correspondence, it appears (1) that the French Government asserted an exclusive right to fish on the Newfoundland shore from Cape St. John to Cape

Ray; (2) that this exclusive right comprehended the right to fish for cod and salmon; and also to catch lobsters; (3) that the right to dry fish on the Newfoundland coast included the right of canning lobsters; and (4) that the French naval officers, in the absence of British cruisers, were entitled to enforce the rights of French subjects to fish and dry, and to catch and can lobsters. . . .

On the other hand, from the same source, it appears that the British Government denied (1) the exclusive right of fishing claimed by the French; (2) that the French right of fishing extended beyond cod, or that it extended to salmon or lobsters; (3) further, admitting, for the sake of argument, that the French had a right to catch lobsters, that the French had any right to can lobsters on the Newfoundland coast; and (4) that the French naval officers had any right to enforce obedience, within the Island of Newfoundland, or within the territorial limits thereof, as to the rights claimed by the French nation. . . .

The Government of Newfoundland took up the same positions as the British Government in regard to the points above specified.

On the 21st June, 1886, M. Waddington, wrote to the Marquis of Salisbury that M. de Freycinet had directed him to write to his lordship in these terms:—"The instructions which have been addressed to the commanders of our cruisers are the same as those which the Government of the Republic had already thought it necessary to give in 1883. Our officers are directed to seize and confiscate all instruments of fishing belonging to foreigners, resident or otherwise, who shall fish on that part of the coast which is reserved for our use." Here, in the most explicit terms, the French Ambassador claimed that the French people had an absolute and exclusive fishery, and had a sovereign right to enforce it in British territorial waters. In answer, Lord Rosebery, then Foreign Minister, wrote, on the 24th

July, 1886, to M. Waddington, and asserted the sovereign rights of the British Crown over the whole of the Island of Newfoundland, and repudiated the French claim of an exclusive right of fishing, within certain limits, in Newfoundland.

On the 26th August, 1886, M. Waddington wrote to Lord Iddesleigh; at that time Foreign Minister, complaining of the establishment at Port-a-Port, on the "French shore," of English factories for preserving lobsters, and stating that the commander of the French naval division at Newfoundland had ordered the persons who had erected these factories to stop their fishing, and protesting against the erection of such factories. On the other hand, as shown by a note from the Colonial Secretary (Mr. Stanhope) to the Foreign Secretary, on the 31st August, 1886, the British Government objected and protested against the establishment of a French factory erected at Port-au-Choix, on the north-west coast of Newfoundland, for canning lobsters.

On the 20th April, 1887, the French Ambassador wrote to Lord Salisbury that "the Government of the Republic, at the unanimous desire of French shipowners, have revoked, so far as their citizens are concerned, the decision authorising the use of lobster traps in Newfoundland." He expressed the hope that Her Majesty's Government would issue a similar order to British subjects, and applicable to the Newfoundland waters reserved for the use of French fishermen, and asserted an exclusive right of fishery there as existing in French citizens. A few days afterwards, his Lordship wrote in answer that the suggested order would be considered by this country and Newfoundland. He then repudiated the view that the French fishermen were entitled "to the exclusive right of fishing in the waters of Newfoundland reserved to them." His Lordship asserted that the provisions of the Declaration of Versailles in 1783, to the effect that the old methods of

fishery "shall not be deviated from by either party" was inconsistent with the alleged right of exclusive fishery.

During the fishing season of 1887, everything on the Newfoundland coast had gone on smoothly between the British and French fishermen and naval officers. But, in the following year, an intimation was made, by the French naval commanding officer to the commander of the *Bullfrog*, that Mr. Shearer's Lobster Factory at Port Saunders must be closed in 1888, in order to make way for French fishermen, and threatening to prevent, if necessary, Mr. Shearer's operations. In answer, the commander of the *Bullfrog* informed the French naval officer that the British Government did not recognise any right in French naval officers to interfere with British subjects in Newfoundland. I ought here to state that Mr. Shearer is a British subject.

On the 24th June, 1888, the French war-ship *Drac* arrived at Hawling Point, White Bay, and on the so-called "French shore," and prevented a Mr. Andrews, a British subject, from erecting a building for packing lobsters there; and the French Commander stated that his Government had conceded to a French company, of whose servants a large number had then arrived, an exclusive right to fish for lobsters for five years. The French then proceeded to land a large quantity of machinery, and began to erect very extensive and permanent buildings. Governor Blake, of Newfoundland, protested against this assumption of territorial rights by France, and against the establishment of the new lobster factory, and communicated his protest to the Colonial Secretary, by whose instigation a complaint was made to M. Goblet, the French Foreign Minister, on the 18th July, 1888, that such erection and interference were infractions of British sovereign rights.

On the 28th March, 1889, Lord Salisbury wrote to M. Waddington that Her Majesty's Government saw no reason to depart from the conclusions announced in his letter of

the 21st December, 1888, as to the lobster fisheries, and that it was desirable that some new solution should be reached by which all further discussion would be unnecessary. In this letter, his Lordship states that "the question, whether *crustacea* are fish within the provisions and intentions of the Treaties affecting the French rights of fishing on the coast of Newfoundland is one upon which the two governments are divided in opinion—Her Majesty's Government have never admitted the contention of the French Government on this point; for the Treaties expressly apply to such fish as are capable of being dried on stages and scaffolds. But, even if it was admitted, for the sake of argument, that French subjects are entitled, by Treaty, to fish for lobsters in Newfoundland waters, the claim now put forward to establish on shore factories for canning lobsters is one which, in the view of Her Majesty's Government, is clearly excluded by the terms of the Treaty." Further, he goes on to state that the catching and tinning of lobsters is a new industry, which has sprung up in recent years, and requires, not "stages usual for drying fish, but factories. It involves operations never before practised, and Her Majesty's Government must renew their protest against the establishment of such factories and the pursuit of such an industry by French fishermen on British territory, under a claim of Treaty right."

On the 22nd June, 1889, Lord Salisbury wrote M. Waddington that British subjects had established lobster factories in St. Margaret's Bay and Brig Bay, for some time, and he requested that the French Government would not allow lobster factories to be established on the Newfoundland coast so long as the matter was under discussion between the two Governments.

On the 22nd June, 1889, M. Waddington wrote Lord Salisbury in answer to his Lordship's letter of the 28th

March previously in regard to Mr. Shearer's lobster factories. He reiterates the claim made for damage done by Mr. Shearer's lobster pots to a fisherman's net, and demands compensation as previously asked. He states that "Her Majesty's Government are aware that the principle of the Treaty of Utrecht was the partition of the Newfoundland coast between English and French for the purposes of fishing;" and that, as it was found that a part of the said coast, namely, that extending from Cape Bonavista to Cape St. John, was being worked by both nations, a supplementary convention to complete the separation and assure harmony of working, was concluded, by which this part is given to the English, whilst in exchange, the French received the part lying between Point Riche and Cape Ray." He asks, "Is it not true that the Shearer factories are erected on the 'French shore,' that is, on a spot where there should be no establishment belonging to an Englishman?" and "Does he not shelter himself behind the privileges of the 'French shore,' in order to refuse to conform to the English regulations?" As to the French right to fish for and preserve lobsters as well as cod, he thinks that the arguments of his Lordship do not meet those put forward by the French. He states that the Treaty of Utrecht gives the sovereignty of Newfoundland to the English Crown, and divides the coast, so far as fishing is concerned, between the French and English fishermen. He holds that the lobster canning establishments are no more permanent than the cod drying establishments.

He reminds his Lordship that, "before 1713, the Newfoundland coast was, every year, the scene of armed struggles between the French and English crews; and that it was in order to put an end to this state of things, whilst leaving France the right to fish in the waters of the island, that the coastal waters were divided between the two

nations, so that each had its proper coast where its subjects would be undisturbed." He adds that the statesmen of 1713 never intended to give the French "a monopoly of smooth-skinned or scaly animals, and to leave to the English the right to catch shell fish and crustaceans. This would have brought about not harmony, but on the contrary, disorder." He concludes by stating that the British lobster fishing is incompatible with French Treaty rights, and that it practically nullifies them.

On the 9th July, 1889, Lord Salisbury addressed M. Waddington on the general question as to the French rights on the Newfoundland coasts, and sent him a copy of a Memorandum, prepared from the records at the disposal of the Foreign Department and the Colonial Office. This Memorandum will be found in the *Blue Book*, pp. 254—262, and treats, in detail, (1) of the state of affairs prior to the Treaty of Utrecht ; (2) of the language of the Treaty of Utrecht ; (3) of the state of affairs subsequent to the Treaty of Utrecht ; (4) of the Negotiations of Versailles in 1782 ; (5) of the Negotiations in 1801-2 ; and (6) of subsequent discussions." This able and important document is well summarised by Lord Salisbury in these words :—" You will find, upon what appears to Her Majesty's Government to be indisputable evidence, that the sovereignty of Newfoundland has, from the earliest times, belonged to the British Crown, and that the interests of France were limited to the possession of Placentia, and to the temporary occupancy, by conquest or settlement, of certain portions of the adjacent coast. All these interests were abandoned by the Treaty of Utrecht, which stipulated that no claim of right should ever henceforward be advanced on behalf of France, and that it should be allowed to her subjects to catch fish and dry them only on land on a certain specific portion of the coast. The concurrent right of British subjects to fish off this part of the coast was undoubtedly asserted, and put

in practice, subsequent to the Treaty, and not later than 1766, and a short time afterwards it began to give rise to repeated complaints from the French Government, not on the ground that it was in itself contrary to the Treaty, but because of the manner in which it was exercised, which was said, in many cases, practically to derogate from and annul the liberty of Fishery accorded to the French. The arrangements made at Versailles in 1783 were not obtained by appeals to the moderation of the French Government, with the view of obtaining concurrent rights of fishery for British subjects, but were the outcome of negotiations in which the French Plenipotentiaries endeavoured, but unsuccessfully, to obtain the explicit concession of an exclusive right of fishery for the French." (*Blue Book*, p. 253.)

His Lordship further pointed out that Mr. Fox was not in office at the Peace of Amiens in 1802, and that no trace of any assurance by the British Plenipotentiary, Lord Cornwallis, of a French exclusive Fishery had been found in this country. He goes on to state that the whole question rests on the interpretation to be given to the Declaration of 1783. He also quotes a passage from a dispatch of the 10th July, 1838, by Lord Palmerston to Count Sebastiani, in these words:—"The British Government has never understood the Declaration to have had for its object to deprive British subject of the right to participate with the French in taking fish at sea off that shore, provided they did so, without interrupting the French cod fishery." Referring to and refusing to entertain a claim preferred on behalf of Messrs. Robial and Besnier, and to the special orders given to the British naval officers to prevent undue interference, his Lordship concludes his letter in these words:—"Her Majesty's Government have every wish that the assurances contained in the Declaration of 1783 should be punctually and completely

fulfilled, but they cannot admit that there is anything in those assurances, however liberally they may be construed, which should involve liability for such a claim."

On the 5th November, 1889, the Secretary of the French Embassy in London (M. Jusserand) wrote to Lord Salisbury in regard to the alleged illegal seizure of Mr. Shearer's Lobster Traps, off Keppel Islands, on the 15th June, 1889, by order of an officer of the French naval squadron. He admitted the facts, but denied the conclusion of Her Majesty's Government. He also states that "the occupation of the Bay of Port Saunders by an English Lobster Factory, is, not only with regard to the ground occupied on shore, but even with regard to the waters over which we have the predominant right to fish, irregular, and, according to the views which my Government have never ceased to uphold, illegal, and cannot possibly be recognised by them. As this Embassy has many times already pointed out, and as appears from the text of the Treaties, the French have the right to fish at any moment in the season, on any part of the coast which is assigned to them by International Agreements to fish continuously or intermittently, giving notice of their intention or without warning. This being so, to admit that Mr. Shearer, or any other foreign trader or manufacturer can assign to himself a portion of the grounds over which we have the right of fishing—a portion which he might extend at his pleasure, under the protection of the British cruisers, and the access to which would be closed to our ships—to admit such a right would be to renounce the privileges which the Treaties expressly guarantee to us, and to admit that our rights of fishing apply only to such parts as may be left free by the said traders or manufacturers." He also states that the fishermen on the spot, "acted, in fact, as if the right of our fishermen did not exist before their own, and as if they were at liberty to extend their fishing

operations with no other limit but their own interests." He further states that "if an English vessel had been on the spot, he," the French Commander, "would certainly have requested her to take the action which he saw himself compelled to take. Being alone, he was compelled, in the opinion of my Government to act as he did, else he would have admitted the right of the actual occupier of the fishing grounds to dispose as masters of the 'French shore.'" By this Correspondence, the reader will perceive that the French Government took upon themselves the responsibility for the acts which Her Majesty's Government declared to be illegal. Let us suppose that the commander of a British war-vessel had been requested by a French naval officer to have Mr. Shearer's Lobster Traps removed, and he had refused compliance, as on Her Majesty's Government's own subsequent proceedings he was bound to do, and that the French naval officer had proceeded to have the lobster pots removed, as on the position taken up by the French Government he would have been justified in doing, what would have happened? Either the British commander would have opposed the French naval officer, or he would not have done so. In the former case, there would most probably have been war between Great Britain and France; and in the latter case, the British commander would have been an eye-witness of an act of gross injustice against a British subject whom he was unable or unwilling to protect. Surely the British and the French Governments should at once take steps to prevent the possibility of war breaking out between them in regard to such a comparatively insignificant matter. M. Jusserand affirms that the intervention complained against was neither novel nor unusual. He added that "in the absence of English cruisers, the French naval squadron has always itself repressed the illegal actions of the local fishermen."

On the 31st December, 1889, Lord Salisbury wrote M. Waddington in answer to M. Jusserand's note of the 5th of that month, and states that her Majesty's Government cannot admit that there is anything in the Treaties which could be held to give to French vessels-of-war jurisdiction in British waters; and asserts that any French act of jurisdiction in such waters always had been protested against by Her Majesty's Government. He further states that "In any case, in which it may appear to the commander of a French vessel-of-war, that French fishery rights are being interfered with, Her Majesty's Government consider that the proper course for him to adopt would be to apply to the nearest British naval officer on the first available opportunity."

He further states that "Her Majesty's Government maintain that, in the absence of an express arrangement being in force to the contrary, sovereignty alone can justify such action as that taken in the present instance by a ship-of-war in territorial waters; and reiterates his former statement of 9th July previously, that Her Majesty's Government cannot admit any claim on the part of France to do anything implying, in any degree, the existence of French sovereignty in Newfoundland waters." He concluded this letter by stating that "Captain Antoine's proceedings, which would not have been justifiable even if Mr. Shearer had, at the time, been guilty of an infraction of the Treaty, by interfering with French fishermen, appear to be of a still more unjustifiable character in the absence of any interruption to the French fishery rights, and became thereby an invasion of British territory."

In answer to Lord Salisbury's letter of the 31st December, 1889, M. Waddington wrote a reply on the 5th April, 1890. From this reply, I quote the following paragraph, as translated, *Blue Book*, p. 378: "As your Lordship is aware, from the arguments set forth at different times by

this Embassy, we hold that the Treaties give us the right to capture all species of marine animals. We cannot admit that our fishermen would fully enjoy the privileges accorded to them by the Treaties if they were allowed to catch certain marine species only, and not certain others. Their right to free and unimpeded fishing within the geographical limits laid down by the Treaties has always been insisted upon by us, and cannot rightly be contested. The arguments brought forward against our views have often been refuted. I shall not re-commence this reasoning, which is to be found, in detail, especially in the note which I addressed to your Lordship on the 15th December, 1888."

He also states that "The fishermen of these factories,"—i.e., Mr. Shearer's men in St. Margaret's Bay, on the coast claimed by the French—"occupy, by means of strings of lobster pots, a large portion of the grounds over which we have privileged fishery rights. They render the coast useless to us for all fishing whatever, cod fishing as well as every other." He adds, this state of things was an impediment to the French Fishing on the Newfoundland coast, and its removal was indispensable. He again reiterates the French claim to remove the impediment; and asserts that, in the absence of British cruisers, the custom was for the French cruiser to remove it; and defends and justifies the conduct of the French commander in his action against Mr. Shearer.

According to an extract from the French *Journal Officiel* of the 17th May, 1890, on an interpellation in the Senate, "M. Bozérian went over the whole ground, and contended that the French claims had been fully recognised by the British authorities in Newfoundland themselves, as was proved, for instance, by the Proclamations of Sir Charles Hamilton and Admiral Cochrane in 1822 and 1828."—*Vide Blue Book*, pp. 404-422. Having read these proclamations, in the original English, I venture to affirm that they

do nothing of the kind ; but that they do quite the contrary. But, for my part, on the basis of a concurrent right of fishery, general in its terms, and without any exception, I cannot see how lobsters can be excluded from such a right as against the French or the British.

On the 29th May, 1890, Lord Salisbury wrote to the Secretary of the French Embassy in London, in answer to M. Waddington's note of 5th April, 1890. In particular, his Lordship, referring to M. Waddington's claim on the part of a French naval officer to vindicate, and put in force, his view of the French rights as against a British ship, states that "The doctrine laid down in these general terms seems to Her Majesty's Government to be both novel and dangerous, and I would ask whether his Excellency is prepared to admit that, in cases of rights secured by Treaty to British subjects within French territorial jurisdiction, Her Majesty's Government are to be regarded as the sole judges, whether such rights are infringed, and as entitled to direct British officers to vindicate them by force against French officers, without any reference to the French authorities." "The case," he also states, "is not one of ordinary Treaty stipulations. The instrument is in the form of a Declaration by the King of England to take steps to secure the French fishermen from interruption. It contains nothing whatever that implies the right of the French naval officers to carry into execution the proclaimed intentions of the English King according to their own judgment and discretion, and, by forcible means to exclude his subjects from any portion of the coast." His Lordship denies that the French naval officers have any right of control over British fishermen. He concludes by stating that "The British naval officers have instructions to do all in their power for the protection of French rights as recognised by Her Majesty's Government. They will abstain, as they have always done in the past, from inter-

ference with the French fishery, and Her Majesty's Government feel that there is nothing unreasonable in expecting that, under these circumstances, French officers will abstain from attempting to exercise authority over British subjects within British territorial jurisdiction; and, according to general International usage, will appeal to British officers in cases where the Treaty obligations of Great Britain are involved."

On this branch of my subject, I hold that I have proved: 1st. That the French, neither by Treaty, nor by use, nor by International Law, have acquired an absolute and exclusive right of fishery between Cape St. John and Cape Ray. 2nd. That British subjects have the right to fish for all kinds of fish between the said points during the fishing season, and that their general, National, and International rights of fishery in Newfoundland were never surrendered by any Treaty, or abandoned by neglect. 3rd. That lobsters are within the terms of the Treaties, and of a common right of fishery. 4th. That the French have no legal right to erect any permanent structures in Newfoundland. And 5th. That the French have no right by Treaty, or by International Law, or by user, to enforce French Treaty Rights, within the territorial dominions of Newfoundland.

What say the Newfoundlanders?

VIII.—NEWFOUNDLAND VIEW AS TO FRENCH LOBSTER FISHING AND CANNING.

The view of the Newfoundlanders, in regard to the French claims of lobster fishing and canning on the shore, is expressed in a despatch dated the 2nd August, 1880, by the Governor and Commander-in-Chief in and over the Island of Newfoundland and its dependencies, to Lord Granville. It is thus stated: "It is, I presume, unnecessary for me to point out in detail that the establish-

ment of this factory,"—which was a French factory at Port-au-Choix, for canning lobsters,—“is in direct contravention of the Treaty of Utrecht ; but I may mention briefly (1) that the land of that portion of the coast of this island on which the French have Treaty rights can, under that Treaty, be used by them only for the drying of fish ; (2) that the fish contemplated by the Treaty are only such as are preserved by drying ; and (3) that even if lobsters can be considered as fish, and fish of the description that can be caught upon the coast, within the meaning of the Treaty, the use of the land for preserving them, and the erection of any “buildings there besides stages made of boards, and huts necessary and usual for drying of fish,” is expressly forbidden by the 13th Article of the Treaty. I venture to disagree with this too. I think that this contention is, to a large extent, erroneous, and that lobsters are fish, and that canning lobsters should be held to be within the terms of that Article, under the same conditions as drying fish. Further, the Governor proceeds to suggest to the Imperial Government that a local Act, 41st Vict., c. 16, should, with the approval of Her Majesty’s Government, be put in force against the French. By this law, sect. 1, the Governor, in Council, might, by order, restrict or prohibit, either entirely, or subject to any exceptions or regulations, the fishing for and taking of lobsters within any district in the Colony of Newfoundland named in the order, &c., under a penalty not exceeding one hundred dollars for disobedience.

I may here observe that each lobster factory requires from 10 to 20 miles of coast-line to furnish a profitable supply for canning, and that the business of canning lobsters is a well-established and profitable industry in Newfoundland. If the French were to establish such factories in any great number in Newfoundland, the whole coast would be used by the French fishermen and the British fishermen would be excluded from their own shores by the French

cruisers, in the absence of British cruisers, on the ground that they were interfering with the French right of fishing, on the whole extent of coast from Cape Ray to Cape St. John. Surely, such a state of affairs would be a gross infringement of British territorial and sovereign rights.

IX.—CLAIM FOR INDEMNITY TO FRENCH FISHERMEN INJURED BY BRITISH COD-TRAPS.

On the 5th July, 1887, M. Waddington made a claim for indemnity against the British Government, in consequence of the cod-traps of some British fishermen on the Newfoundland coast. The claim is formulated in a letter to the Marquis of Salisbury, as follows:—"I am instructed by M. Flourens to approach your Lordship on the subject of a claim for indemnity put forward by MM. Besnier and Dupuis-Robial, French shipowners, against Her Majesty's Government, on account of injury caused them during the last fishing season by the practices of English fishermen, and the insufficiency of the measures taken by the English authorities to guard them against this competition."

"In fact the harm done to the French fishermen—which the English cruisers, notwithstanding their activity and good will, are powerless to prevent—is very great."

By right, the responsibility of Her Majesty's Government rests on a Declaration of King George III., already quoted, and refers to the King's taking measures to prevent the French being interrupted in the rights of fishing conferred on them by the Treaty of Utrecht (*Blue Book*, p. 114). It will be observed that the claim here set up is by the French Republic against the British Government, and not by private persons against private persons; and by and through our alleged neglect of a public International duty. The French Government, therefore, took the Versailles Declaration and Counter-Declaration as a contract to be performed by Great Britain, and as involving compensation when a

breach of the contract has been committed. That damages arise in such a case is undeniable. If they are not satisfied in some way, they are unquestionably a *casus belli* by International Law. This French claim is supported by a long and interesting letter of Commander Le Clerc, of the *Indomptable*, stationed on the Newfoundland coast, asserting an exclusive right of fishery as belonging to the French from Cape St. John to Cape Ray. He holds that the British Government is bound to protect the French fishermen in this right, or to satisfy them for the pecuniary loss sustained. He maintains that the British Government had constituted themselves the guardians of this exclusive right. He states that the fixed settlements of the British were never removed, and that the British fishermen injured the French by their competition. He concludes in these terms : " France has acted in conformity with the ideas of civilisation in only using sparingly those of the rights conferred on her by the Treaty of Utrecht and the subsequent Declaration, which might seem to be opposed to the natural development of the wants of the population which have chosen to dwell on the part of coast where we fish. But this wise toleration can never release England from the duty of keeping her engagements ; and it is only too evident that the claimants, having been ruined by the competition of their rivals, have a right to be indemnified by the Government which had undertaken to guarantee their industrial operations." This claim of indemnity was based on a diminished catch of fish by French fishermen, and was a claim founded on a most problematic basis. In answer to this claim, Lord Salisbury wrote to M. Waddington, on the 24th August, 1887, that " Her Majesty's Government have come to the conclusion that the French fishermen have no legitimate claim to compensation in respect of the losses which they allege that

they have suffered in consequence of the use of cod-traps by British fishermen."

He also states that "Her Majesty's Government have always held that there is nothing in the 13th Article of the Treaty of Utrecht, or in the Declaration of 1783, which deprives British subjects of the rights of taking fish at sea off that part of the shore to which the French Treaty rights apply, providing they do not molest the French fishermen in the exercise of their Treaty right of fishing, nor interrupt them by their competition. It is manifest that such molestation and interruption can only refer to a physical obstruction and impediment to the exercise of the French right of fishery, and not to any diminution to the French catch of fish, which may be supposed to result from the mere participation by British fishermen in the sea fishery. . . . They are nevertheless prepared to take steps to cause the effect of these cod-traps upon the net fisheries, both British and French, to be carefully examined and will then consider how far their suppression may be advantageous to the fishing interests of both nations."

His Lordship also states his view of the general right of fishery claimed by the French as follows: "I need hardly remind your Excellency that the right of fishery conferred on the French citizens by the Treaty of Utrecht did not take away, but only restricted, during a certain period of the year, and on certain parts of the coast, the British right of fishery inherent in the sovereignty of the island." He further admits that "if cod-traps are used by British fishermen in fishing grounds within the French fishery limits which are *bonâ fide* required by French fishermen for their own use, the latter have a right to demand that such fishing grounds be vacated, and to call on the proper authority to enforce their demands." This is an admission which, I hold, gives a wider interpretation than the Treaty, or the circumstances at the time of the Treaty demanded.

The reply to Lord Salisbury's letter is dated the 3rd March, 1888, and re-argues the question; and states that the French Government cannot consider his Lordship's answer as final, and asks him to submit the question to a fresh examination. M. Waddington states that "Your Lordship must be aware that such could not have been the intention of the High Contracting parties in 1783, and the expression, 'interrupt,' employed in the translation of the Declaration of the 23rd September of the same year, has evidently not the same meaning as the French word 'interrompre;' on the contrary, it corresponds to the much more general expression 'troubled.' On this point, no discussion seems possible; since, as your Lordship is aware, the Declaration of the 3rd September, 1783, was only drawn up in one language, the French; and the original text signed by the Duke of Manchester states that 'Sa Majesté Britannique prendra les mesures les plus positives pour prévenir que ses sujets ne troubleront en aucune manière, par leur concurrence, la pêche des Français.' This allusion to 'competition' would suffice in itself to show that the prohibition is not limited to acts grave enough to constitute an interruption, properly so-called; for competition does not interrupt the rival operation in question; it injures it solely by its parallel action." He denies that the British Government are relieved from responsibility by their failure to perform a duty which they were called upon to discharge. He refers to the rejection of the Convention of 1885, and regrets its rejection, which, he adds, was not brought about by the French, but by the British Colonial Government. He maintains that the French have an exclusive right of fishing, as previously exercised before that Convention, in the rivers and salmon fisheries as well as on the coast itself.

On the 28th July, 1888, Lord Salisbury wrote M. Waddington in reply, and stated that Her Majesty's

Government were unable to see anything in the views of His Excellency to justify them in departing from the conclusions at which they had arrived in the matter, whether as regards the general question of the nature of an "interruption," or the particular claim before them. He then proceeded to state that "The right of British subjects to fish concurrently with French citizens has never been surrendered, though the British fishermen are prohibited by the second paragraph of the Declaration of Versailles from interrupting in any manner, by their competition, the fishery of the French, during the temporary exercise of it granted to them, and therefore in the view of Her Majesty's Government, the 'interruption' referred to in the Declaration can only mean a physical interruption, caused by competition." He further informed him that the Cod-Trap Bill had been passed by Newfoundland, and would enable the cod-traps to be abolished in two years. In conclusion, he complained that "the French fishermen are abusing their fishery privileges, with the aid and support of their own authorities, by erecting lobster factories on the coast in violation of the sovereign rights of the British Crown, and of the express provisions of the Treaty." This complaint had reference to the proceedings of the *Drac*, on the 24th June, 1888. (*Vide p. 343 ante.*) On the 23rd November, 1888, Lord Salisbury wrote to the French Ambassador in London that "Her Majesty's Government are unable to assent to the claim advanced by your Excellency that the French Government must be the sole judges as to what constitutes such interference within the terms of the British Declaration of 1783.

"This is a question on which both Governments have an equal right to form an opinion, and as to which Her Majesty's Government have always endeavoured to meet the French Government as far as possible consistently with the just claims of the Colony."

On the 7th December, 1888, M. Waddington wrote, in reply to Lord Salisbury's letter of 28th July, 1888, that the claims for indemnity made by the French Government could not be rejected without jeopardising the principles on which the enjoyment of the French rights of fishing on the Newfoundland coasts depended. He states that the British claim, then set up, for the first time, of an absolute right of British fishermen to fish concurrently with French citizens, brought into discussion the question of concurrent fishing, and gave the 13th Article of the Treaty of Utrecht a meaning which his Government could not accept. He bases his argument on the supposition that this French right of fishing was then reserved to France; and refers to the coast over which the right was to extend as the "reserved coast." He states that "France retained the exclusive right of fishing, because she had always had it;" and that "British statesmen have never for a moment questioned our right to exact the expulsion of their countrymen" from the "French shore." He acknowledges that "the English were indubitable proprietors of the soil." He represents the Versailles arrangement as an act of great magnanimity by the French King. He asserts that the two parties then refused to each other the concurrent right of fishing. He states that, in 1802, the Paris Cabinet thought fit to establish the exclusive right of fishing by a modification of the Treaty of Utrecht; but, as Mr. Fox, the Minister, did not see the use of the amendment, there was a return to the text, pure and simple, of 1783, and that the British Government never questioned the exclusive right as belonging to the French. He quotes Lord Palmerston's words on the 10th July, 1838, as follows: "It is true that the privilege secured to the fishermen of France has, in practice, been treated as an exclusive right because it would scarcely be possible for British fishermen to dry their fish upon the same part of the shore with the French

fishermen, without interfering with the temporary establishments of the French and without interrupting their operations."

The French Ambassador in London further states that "the new doctrine was enunciated by the Newfoundland legislature as to the nature of our fishery rights." He quotes the 1st Article of the Convention of the 15th January, 1857, signed in London by M. de Persigny and Lord Clarendon, in the following terms: "French subjects shall have the exclusive right to fish, and to use the strand for fishery purposes," and goes on to state that "This was nothing else than a formal recognition of ancient rights over the territory occupied by the French fishery," and that subsequent negotiations did not break down on "the question of the recognition of our right of exclusive fishing." He further states, "My Government, therefore, had reason to believe, in view of the above facts, and in consequence of this series of engagements, that the right of France on the coast of Newfoundland, reserved for her fishermen, was nothing less than a part of her ancient sovereignty over the island, which she retained when ceding the soil to England, but which she has never diminished nor alienated." He informs Lord Salisbury that his Government cannot admit the principle of concurrent fishing.

I have already proved that France never held the sovereignty of Newfoundland. I venture to affirm that unless my historical statements in the first part of this Article are fictitious and imaginary, most of the historical statements put forward by the French Ambassador in this despatch are incapable of proof.

On the 17th December, 1888, Lord Salisbury wrote to Lord Lyons, the British Ambassador at Paris, in regard to the French lobster factory established at White Bay, and pointed out to him that "By the terms of the Treaty French citizens have no right to erect on the Newfoundland

coast any buildings other than 'scaffolds,' and 'stages made of boards,' and 'huts necessary and usual for drying fish ;'" and that, even admitting, the erections to be temporary in their nature, still, they were not used for an industry within the terms of the Treaty. He further holds that "the grant by the French Government to a French company of the *exclusiye* license to fish for lobsters in that locality for the term of five years is, in the opinion of Her Majesty's Government, an assumption of territorial rights in derogation of the sovereignty of the British Crown, and unwarranted by the Treaty."

On this branch of my subject, I hold : 1st. That this French claim of indemnity is unjustifiable, on the basis of a common right of fishery existing in the British and French nations. 2nd. That the partial expulsion of British subjects from the "French shore" was not carried out in favour of any special right of France, but as a part of our own general policy in Newfoundland. 3rd. That France has no sovereign rights in Newfoundland or any part thereof. 4th. That the British and French Diplomatic views are fundamentally antagonistic, and might easily lead to dangerous and deplorable results. And 5th. That French Governmental concessions to fish in Newfoundland, over a specified area, or for a fixed period, are not within the meaning of the Treaties.

X.—ALLEGED ILLEGAL SEIZURES OF BRITISH COD-TRAPS IN 1886.

On the 6th July, 1886, a cod-trap of a John Pilgrim in Herring Cove was taken up and retained by the sailors of the French man-of-war *Clorinde*. He was told that, if he wanted it, he must ask for it from the French man-of-war at Quirpon. He swore that the trap did not interfere with any French fisherman; and that he had lost a year's fishing by the conduct of the French (*Vide Blue Book*, 1884-90, pages

66 and 67). Again, on the 27th July, 1886, a man called Parmity, at Ha-Ha Bay, had a cod-trap removed and retained by the men of the *Clorinde* (*Ibid.*, p. 67). Both seizures are contrary to the Treaty rights conceded to the French, and by the practice of the French down to 1884. That the Agreement of 1884, and that of 1885, Article 9, would justify such seizures, is no justification; because these Agreements were never sanctioned by the Colony of Newfoundland, the consent of which was an essential requisite to the validity of either.

The captain of H.M.S. *Emerald* protested to the French naval officer of the *Clorinde* against his action in seizing these cod-traps, the property of Newfoundland fishermen (*Ibid.*, p. 67). On the 20th September, 1886, the French Chargé d'Affaires in London wrote to Lord Iddesleigh that, spontaneously, and before the aforesaid Protest was made known to them, the French Government had ordered the cod-traps to be returned; but that they would not be held to be bound to do so in future.

Subsequently, on the 8th September, 1886, the commander of the *Clorinde* defended his conduct, and affirmed that he merely acted as he had done in the absence of Her Majesty's ships, and for the necessary protection of French rights of fishing from interruption by the Newfoundland cod-traps, which were a serious interference to the French net-fishing. He adds: "You will understand, Sir, that the protection which the British cruisers try, with the best will in the world, to accord to our fishermen is entirely illusory; for they are no sooner gone, their smoke has no sooner disappeared, than the destructive engines used by your countrymen are replaced. So true is this, that last year," in 1885, "the British cruiser had herself to confiscate the engines at Ha-Ha, to put an end to this state of things." He adds: "It was not their," the French Government's, "intention to commit an act of

arbitrary seizure, on the property of fishermen, who profit by their position as British subjects, to destroy the fisheries which the Treaties reserve for our use; but to safeguard, for our citizens, the free exercise of a right which becomes illusory, in view of the obstinacy with which British fishermen evade the orders given to them by the cruisers of their own nation." I make these quotations for the purpose of pointing out the difficulties and troubles which have arisen in the exercise of these Treaty rights, and of shewing the fair and honourable spirit in which the Naval officers of both countries have endeavoured to protect the rights claimed by their respective Governments. On the 9th September, 1886, Captain Hammond, of the *Emerald*, formally withdrew his protest against the seizure of the cod-traps, on the ground that it had become unnecessary, and the incident ended. On the 18th October, 1886, the Secretary informed the Governor of Newfoundland that "As regards the action taken by the French naval officers in seizing the fishing-gear of British subjects, I have suggested to the Secretary of State for Foreign Affairs that the French Government should be informed that Her Majesty's Government cannot recognise any right on the part of French naval officers to take such action under existing Treaties."

On the 16th August, 1889, the Assistant Under Secretary for the Colonies (Mr. Bramston), at the request of Lord Knutsford, wrote to the Foreign Secretary calling his Lordship's attention to the action taken by Captain Antoine, of the French vessel *Bisson*, in raising the lobster-traps of British subjects, and suggesting that a protest should be addressed to the French Government against the proceedings on the part of Captain Antoine. "This action, in itself illegal, appears," he states, "to be aggravated by the fact that there were, in the immediate neighbourhood, British men-of-war to whom application might have been made by the French Captain."

On the 4th November, 1889, Lord Salisbury wrote to Lord Lytton to complain and protest against the action of the *Bisson* as illegal, and as likely, if persisted in, to produce complications which both Governments anxiously wished to avoid. His Lordship also requested Lord Lytton to intimate "that Her Majesty's Government will feel compelled to present a claim for compensation on account of the injury to the lobster-traps in question, as soon as the full particulars of the loss suffered by British subjects has been ascertained." Such intimation was accordingly made on the 16th November, 1889 (*Vide Blue Book*, p. 308).

I submit that the French action in this matter was totally illegal, and can be justified only on the ground of the loose way in which our sovereign rights in Newfoundland have been hitherto enforced by the Imperial Government.

XI.—DISCUSSION OF CONTENTIONS.

I have now given an historical review of the steps which led up to the establishment of Newfoundland as a self-governing Colony from its condition as a fishing station open, to a large extent, to the whole world. I have also shewn the various steps by which France acquired her present fishing rights in Newfoundland. There have been made to France by Treaties, concessions which would not now be granted. But, as they have been made, they must not be taken from her without her consent, and without full compensation. These concessions, rightly or wrongly made, cannot now be got rid of except by Treaty, or by war, now or at some future time. If they are to be terminated by war, we must remember that the war would be carried on by the Mother Country, and not by the Newfoundland Colonists. We must be under no misapprehension on this point. The abrogation of permanent Treaty rights is a *casus belli*. Moreover, such abrogation cannot be obtained by the

mere transference of sovereignty to an independent power, such as the United States, nor by a declaration of Independence by the Newfoundlanders themselves. The previous negotiations between the parties concerned shew clearly that the matters of difference between them are not of easy settlement. They also shew that future negotiations on this subject require cautious and delicate treatment; and that future negotiations, to be effective, must receive the sanction of the Colonial Government. As the contentions of the parties are antagonistic and irreconcilable, and extremely dangerous in themselves, the time has arrived when all the parties concerned should come to terms by an amicable arrangement of their differences on this subject. What are these contentions; and what is a reasonable solution of them?

1st. What are the French contentions? Some Frenchmen, as for example, Mons. Flourens, assert that the French people have sovereign rights over the so-called "French shore." Such persons are clearly wrong. Other Frenchmen, such as Mons. Spuller, hold that the French people have exclusive rights of fishing and enjoyment over the said shore. They also are clearly wrong. Other Frenchmen assert that the French people, by Treaty, and by user, have exclusive rights of fishing and curing fish, including lobsters, on the so-called "French shore." Now, if the French have no sovereign territorial rights, they have no right to land military or naval forces in Newfoundland, or to exercise any military or naval authority in the territorial waters of Newfoundland; and they have no International right to deal with offenders in breach of their Treaty rights. At various times efforts have been made to confer a kind of fishery jurisdiction on the French Naval officers, or on a Joint Commission of British and French Naval officers; but, as the Colonists have strong objections to foreigners exercising any kind of

jurisdiction over them, such efforts have hitherto failed. On Legal grounds, I am of opinion that the Colonial objections to foreign jurisdiction are incontestable now, and will, in fact, become stronger in future and not weaker. We are told that the French nation will neither sell nor surrender their rights in Newfoundland; and that they are prepared to defend them. We are also told that they claimed general fishing rights over the Newfoundland shores conceded to them. We are further told that they looked upon the Newfoundland fishery as a great and necessary naval school for the sailors whom they required for their navy. We are likewise told that the French people assert that they have a right to give such bounties as they please to the French fishermen engaged in the Newfoundland fisheries.

If all these statements are true, there is no hope of an amicable settlement. But, if they are persisted in by the French people, then, they must not blame us for taking the earliest opportunity of releasing ourselves from obligations which have, in the course of nearly two centuries been entirely changed in their nature, and which have become irksome and highly injurious to the interests and development of our Colonists and fellow subjects in Newfoundland, and which have become well nigh unbearable by ourselves. The French Republic would do well to imitate the spirit and magnanimity of the French Monarchy in regard to Newfoundland, and come to terms with us in such a manner as would remove all unfriendliness between them and us in regard to this matter. The French would no more suffer in their naval capacity by an amicable settlement than we have done by abolishing the exclusive rights of the Merchant Adventurers of the West of England; for the French would still have the Newfoundland Banks for fishing. Nay more, they would, beyond all doubt, receive every facility for carrying on their fisheries on the

Newfoundland Banks, in exchange for an abandonment of their fishing rights on the Newfoundland coasts from Cape St. John to Cape Ray. The Newfoundlanders have no right or power to interfere with the French carrying on their fishing on the Newfoundland Banks, which are available to the whole world for fishing purposes. If this be so, there remains merely the question of a commercial industry, which can always, and which can certainly in this case, be estimated by a money value, and which, in the circumstances, ought not to be treated by this country in any niggardly spirit, and would not, I believe, be so treated. If a pecuniary compensation is inadequate, in the opinion of the French Government, surely there are certain territorial rights which we might surrender to the French? But, if the French can be persuaded to surrender their Treaty fishing rights, they must understand that they must surrender them all at a certain future date to be agreed upon by the parties, and on the granting of such Treaty rights, for a fixed period as regards Bait for the Deep sea and the Newfoundland Bank Cod Fisheries, as shall be agreed upon. The Treaty rights exercised on the so-called "French shore" in Newfoundland must sooner, or later, be abandoned by the French. This condition is indispensable; because no cause for misapprehension must be left open, and because, as a matter of fact, as soon as large populations take up their residence on the coasts of Newfoundland, the fishing or any Treaty rights conceded to or claimed by France would become intolerable.

2nd. What are the contentions of the British Colonial Office? In 1873, Lord Palmerston denied that the French people had the right of exclusive fishery over the so-called "French shore" in Newfoundland; and, as we have seen, Lord Derby, in 1884, took up the same position as Lord Palmerston. Our Colonial Office also holds that the Newfoundlanders must be subject to the burdens of the *Treaties*

made between France and the Mother Country, as well as receive the advantages of an independent Colonial Government and a rich undeveloped territory. These old Treaties are most injurious to us and to them ; but, as they exist, they must be fulfilled. While therefore the British Colonial Office has always rejected the extreme French claims as unbearable, it has asserted, and rightly asserted, that the Imperial Government must be supreme in its Colonial policy throughout the Empire. We must assert and maintain Colonial rights ; but we must assert them in harmony with International Law and our other Imperial obligations. This principle may occasionally bear somewhat hard on one or other of our Colonies. But the hardship is small compared with the advantage of being under the protection of the British Crown. Nay more, it is a principle which is essential to the preservation and prosperity of our Colonists as well as of ourselves. In the end, our Colonists find that, if we are slow to act in the protection of some particular interest, we generally get all we, or they, can reasonably expect or ask. We are bound to stand up for the interest of our Colonists, and the Newfoundlanders are not unlikely to regret that their views are not pressed by us with as much warmth and strength as they themselves think they should be. The Newfoundlanders must act legally and not involve the British Empire in a war with France.

3rd. What are the contentions of the Newfoundlanders ? They say that they have the full ownership of the so-called "French shore," and that they have fishery rights as great as the French have therein. I need not discuss this contention, because it has already been treated by me. I have also stated that the legal ownership of the whole of the Newfoundland coast belongs to Great Britain ; and that a common right of fishery has been granted to the French on the Newfoundland shores by Treaty and user.

The Newfoundlanders further contend that the Mother country has no right to make Treaties or conventions with France in regard to Newfoundland, without their sanction. I do not admit this contention as a matter of Constitutional right ; but as a matter of prudence, I have no hesitation in admitting that the Mother Country would act most unwisely by making any Treaty which was opposed by the people of Newfoundland. So far as the Mother country is concerned, we can have no interest in this matter unless such as will defend and protect the just rights and interests of our Colonists. Their denunciation of the *modus vivendi* is, therefore, untenable in regard to its legality. But may require our serious consideration as proving that it is objectionable to the persons most directly interested. The importance of this position is most vital in consequence of the contentions raised by the Newfoundlanders to set aside the arrangements made by the Mother Country and France ; and also to refuse to pay taxes to the Colonial Government. I look upon these two propositions as undeniable, namely, (1) that the Home Government has the power of making Treaties with Foreign States ; and (2) that a deliberate refusal to pay taxes is a direct act of disloyalty, and approximates very closely to an act of rebellion.

The Newfoundlanders also say that the French rights, as claimed and actually exercised, are inconsistent with their own development in Newfoundland, and prevent the development of the country, and of its mines and its fishing. I venture to suspect that this assertion is greatly exaggerated ; but I acknowledge that it is not wholly without some foundation. The French object to the shores of Newfoundland being occupied by our Colonists, and do all they can to prevent them from being so occupied. We ourselves did the same two and a half centuries ago against our people. We, therefore, need not be surprised that the French

people should act in the same way in the exercise of their supposed, or alleged, rights against a foreign nation, whose interests, as they imagine, do not coincide with their own. The Newfoundlanders have passed Bait Acts, for the purpose of preventing the French fishermen from most advantageously exercising their Treaty rights. That the Newfoundlanders do suffer loss by the French bounty system, cannot be doubted for a moment. We therefore, cannot be surprised that, in June last, the Legislature of Newfoundland passed a Resolution that the only solution of the trouble which had arisen was the termination, or extinction, of the French fishing rights on the Newfoundland shores. But the question remains, can this solution be attained? I now wish to direct the reader's attention to this point.

XII.—SOLUTIONS.

There are three possible solutions for this most difficult problem. We can denounce the Treaties, and say to the French people that we will be no longer bound by the Treaties. I reject this solution; because it would inevitably lead to war, and because it is contrary to our known policy and conduct to refuse to be bound by Treaties. The denunciation of such Treaties would be a barbarous and unjust solution. Another solution has been proposed by some people who are but meagrely informed of the true facts and circumstances of the case. This solution is to offer Arbitration to France on the subject. Arbitration has already been offered by the British to the French Government as to the lobster fishery; but was abandoned in consequence of the objections of the Colonial officials, and of the generally hostile opinions and feelings of the Newfoundlanders. If any Arbitration is to be accepted by this country, it must be on the distinct understanding that it is to cover the whole fishery rights of the French

people on the coast of Newfoundland, and for the compensation or damages for the loss sustained by their total abolition instead of extinction and limitation of the right of fishing.

I, therefore, have now to consider the third and last solution which I have to mention, and which, I hope, will bring about a permanent arrangement, satisfactory to all the parties interested. This solution is based on a friendly agreement with France, and the payment of a pecuniary satisfaction to her for the commercial and industrial interests which she would surrender to us and our Colonists. This solution can only be reached after a good deal of friendly correspondence and negotiation between the great and friendly powers of Great Britain and France. Let us hope that such a solution will, ere long, be obtained in the interests of the welfare and peace of America as well as of the Continent of Europe, and that, in fact, it is near at hand. We must never forget that this dispute is a commercial as well as an International dispute; and that it involves questions of Bait as against Bounties. Into such questions, however, I do not here enter. I shall here merely observe, in conclusion, that, if France treats this question on the grounds of high national policy, and not on the grounds of industrial interests, she must not blame us for treating the matter from the same point of view. To keep a great fertile region in a backward and undeveloped condition in the interests of a foreign power is neither magnanimous, just, nor reasonable. But, so long as the Treaty rights exist, both France and our Colonists must understand that we shall protect and defend such rights.

XIII.—GENERAL CONCLUSION.

I have now, at last, arrived at the end of the discussion of the great questions which I proposed to myself at the

beginning of this Article. I claim that with the utmost candour and impartiality I have endeavoured to treat this important subject as between two great and friendly Nations.

Having already given my conclusions in each branch of the present dispute, I shall not unnecessarily lengthen this article by a useless recapitulation of these conclusions. In here giving the general result of this inquiry, I shall do enough. From the history of Newfoundland, from the Treaties between Britain and France, and from the recently published Diplomatic Correspondence, I submit to the reader that I have proved (1) that the British and the French have common fishery rights over the coasts of Newfoundland, from Cape St. John to Cape Ray; (2) that these common rights of fishery include lobsters; and (3), that the time has come for the extinguishment of this French right of fishery, be it more or less, or whatever its extent, by an amicable arrangement between the British and French Governments.

I conclude this Article—which has run to a greater length than is usual, yet is not too long for the great, important, and complicated questions involved—by expressing the fervent hope that such an amicable settlement as I have indicated will be arrived at, and by stating that, even although the compensation were to be given by the British to the French Government on the basis of an absolute and exclusive right of fishery belonging to France, it ought, in the interests of the general peace and prosperity of the world, to be made without delay.

ALEXANDER ROBERTSON.

II.—PRIMITIVE SOCIETY: THE HORDE THEORY.*

IN spite of Carlyle's well-known *dictum* that the History of the world 'is at bottom but the history of its great men, it is not unreasonable that in these latter days of Universal franchise and Social Democracy, some attention should have been paid to the subject of mankind considered not only as individuals but also as aggregates. Still the Science of Sociology, as a subject of serious study, is as yet in its infancy. It is one of the youngest of all the Sciences; younger certainly than Geology, younger than Electricity even. Not less than these does it present evidences of a wellnigh illimitable sphere of investigation, of which at present we have only attained the outskirts.

It is a difficult, not to say, invidious task to decide to what particular person or persons is due the credit of first discovering or opening up the previously unknown fields of Thought on the subject of the development, customs, and institutions of human societies.

On the whole, as Geology and Biology in the modern sense of the terms will, for ever, be associated with the names of Lyell and Darwin, so, it may well be believed, the names of Herbert Spencer, J. F. McLennan and Sir Henry Maine will be more closely identified with the study of Sociology than any other names.

The first of these has brought to bear on the subject what we may call, in terms perhaps somewhat paradoxical

* [This Article deals with a branch of an interesting question, opened up to English Jurists by the late Sir H. S. Maine,—the nature and conditions of Early Society,—to which we are glad from time to time to open our pages, as on the occasion of a Paper on *Primitive Penal Law: The Ancient Irish Eric Fine*, by R. R. CHERRY, M.A., in the *Law Magazine and Review*, No. CCLV., for February, 1885.—ED.]

as applied to the apostle of the Synthetic philosophy, the Analytical method, while Maine represents the Historical, and McLennan the Comparative School of Thought. It is this last School which has, in one sense, done more for the Study than either of the others, and in view of the wealth of ideas and almost inexhaustible store of information contributed by such men as the brothers McLennan, Tylor, Lubbock, Morgan, Lang and Bachofen, it is not easy to select any one of these names as supremely representative of the school to which they belong. The late Mr. J. F. McLennan, however, seems best entitled to this honour, and one cannot help thinking with regret of the vast service to the Study of Primitive Societies which he might, and would have rendered, had he lived long enough to carry out to its fulness the cherished work of a lifetime.

When we come to an examination of the present position of the Subject itself, two things stand out very clearly. The first is, the immense store of facts, disconnected and scattered, but more or less relevant, which have been amassed by various enquirers into the ancient and modern history of Man; the second is, the altogether inadequate and unsatisfactory generalisations which have been made from the attempt to systematically study this wealth of information. When we realise that every traveller, or even ordinary globe-trotter who keeps a diary or other record of his experiences—and the name of such is Legion—adds a new budget of observations and ideas, we become painfully conscious that the profusion of our facts is rapidly exceeding our capacity to digest and assimilate them, and that we are threatened with an unmistakable *embarras de richesses*.

There is thus plenty of room for conflicting opinions as to details, but the two main theories into which, for all practical purposes, ideas on the historical aspect of the subject may be divided, are (except on a certain hypothesis)

too clearly antagonistic and irreconcilable to co-exist harmoniously. These two theories of the origin and development of human societies, may be roughly distinguished by the names of their most powerful exponents—Maine and McLennan. From the point of view of numerical superiority alone, Maine is undoubtedly out-voted—indeed it is scarcely too much to say that his theory is represented by himself alone.

The McLennan School, on the other hand, in spite of differences on minor questions, practically comprehends the whole of that body of writers who have been mentioned as having adopted the Comparative method. Herbert Spencer, who only deals with the subject as essential to the completeness of his philosophical survey of the "Knowable," is, if not an adherent of the school, at all events a dweller just without its gates.

It may be a question whether at the present day it is worth while considering the rival merits of the two theories. One thing being granted, there is nothing to make them really inconsistent with each other. If we assume that the Patriarchal System of Maine, is referable to a state of things and a period of history, altogether subsequent to that to which McLennan's theory is applicable—that in fact the one, where it appears, was evolved out of the ashes of the other, then I think we shall be better able to appreciate the merits and defects of each.

It is a singular thing, however, that in their mutual polemics, neither Maine nor McLennan appears to have adequately considered the question whether, as in the tale of the two Knights who quarrelled and fought over the hue of what they afterwards discovered to be a bi-coloured shield, they might not be both right and both wrong at the same time. No doubt, each does in fact incidentally contemplate the possibility of this, but neither will expressly avow it. McLennan, when first enunciating his ideas, in

Primitive Marriage, distinctly assumed that at a certain stage in the development of many Societies kinship through females must have been superseded by male kinship. The result of this being, he admits, that new groups must have been formed with agnatic relationship, leading ultimately perhaps, to "the habit of feigning a common descent from some distinguished man,—a fiction which would lead in many cases to the denial or neglect of such heterogeneity as existed."* This, whether right or wrong, sounds uncommonly like Maine's conception of the Patriarchal *gens* or clan.

On the other side Sir Henry Maine in his later writings has, to a great extent, allowed the validity of many of the more important objections of McLennan to his Patriarchal Theory as originally formulated in *Ancient Law*. In the latter work, Maine, it will be remembered, deduces the origin of society from separate families held together by the authority and protection of the eldest male ascendants. The evolutionary process he traces by shewing how "the elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregation of Families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of tribes constitutes the Commonwealth."† Plausible, in its very simplicity, strongly borne out by the history of two nations, the Romans and Hindoos, with which Maine was exceptionally familiar, this theory appealed not only to popular fancy, but also to the reason of thinking men. Within the last twenty or thirty years, however, the ever-increasing development of biological knowledge, the exploration and detailed accounts of previously unknown lands and peoples by numbers of energetic and enthusiastic enquirers, and the masterly attempts to build up general

* * *Primitive Marriage*, p. 193-199.

† *Ancient Law*, 1861, ch. v., p. 128.

theories from the results of such researches, have pretty conclusively proved the unsatisfactory character of the Patriarchal Theory. The extensive, if not universal, existence among mankind, of institutions and customs which cannot be explained consistently with the latter theory, negative its validity as accountable for the whole of the development of human Societies.

Such an acute and fair-minded writer as Maine could not fail to appreciate these facts at their proper worth. Undoubtedly, to the day of his death, he by no means wholly surrendered his original position, and his keen criticisms of hostile theories are among the most serious stumbling-blocks in the way of their complete recognition.

In his latest remarks on the subject, however, he very considerably receded from the ground which he had at first taken up. Glancing briefly at the many remarkable phenomena of savagery and infant civilisation, to which attention had first been called by McLennan and Morgan, and while criticising and in some cases denying the validity of the latter writer's deductions, he frankly admitted the great importance of the facts under discussion. "It cannot be doubted," he says, "that these phenomena do suggest such a relation of the sexes as may be supposed to leave the paternity of children in much uncertainty." *

It is obvious that such an admission as this, if made without any qualification, would have seriously undermined the Patriarchal Theory. It recognises the existence of female kinship, which (if exclusive) is necessarily inconsistent with the contemporaneous existence of any form of the Patriarchal Family. Maine, therefore, had to find some explanation to enable him to evade the awkward position in which his candour had placed him. "The

explanation," he says, "appears to me to lie partly in Mr. Darwin's conjecture that these phenomena belong to a 'later period when man had advanced in his intellectual powers, but retrograded in his instincts,' and partly in McLennan's hypothesis of a great (and, he appears to think, an universal) deficiency of women in the primitive groups of men."*

I shall have occasion to deal further with these points later on, but at present I only want to make it clear how Maine, in his later years, began to feel the weak points of his Theory as a universal explanation of the genesis of Societies. In one passage in his *Early Law and Custom* he makes another singular admission. "There are," he says, "unquestionably many assemblages of savage men, so devoid of some of the characteristics of Patriarchalism that it seems a gratuitous hypothesis to assume that they had passed through it. It ought further to be admitted that much of the archæological evidence for the Patriarchal Theory is capable of being so put as to suggest the conclusion that the societies, seen to be almost but not quite in the condition from which the theory supposes them to have started, are approaching that condition or tending towards it, rather than declining from it as an older state."†

Maine had thus practically, though very equivocally, admitted in his later writings, and especially in *Early Law and Custom*, that his Theory, although sufficient to explain reasonably well *many* archaic social phenomena, was nevertheless inconsistent with many others of an even more important character. If, in short, the phenomena insisted on by the McLennan School did in fact exist in Primitive times, then some other explanation must be sought than that afforded by the Patriarchal Theory.

* *Ibid.*, pp. 209-210. Cf. McLennan's *Patriarchal Theory*, p. 32.

† *Early Law and Custom*, p. 204.

Since the publication of *Early Law and Custom*, in 1883, our ideas on the subject of Primitive Society have been very considerably enlarged and enlightened, and the study of Sociology, historical and analytical, has been greatly systematised as well as amplified. Everything seems to tend more and more irresistibly to the conclusion that, whether the very earliest type of society is accurately portrayed by McLennan and his school or not, at all events the Patriarchal System must be referred to a comparatively recent era in the history of human progress.

If we assume this, a great many problems become capable and even easy of solution, which are otherwise quite inconsistent and inexplicable. And, after all, as I have endeavoured to shew, such an assumption is one which was distinctly, though unavowedly, contemplated by both Maine and McLennan, and if, with this fact in view, those writers had been content (as we might fairly have expected them to be) to devote their energy to attacking only those vulnerable points in each other's armour which were of vital importance, we might have reached, by this time, a much more advanced stage in the controversy and in our knowledge of the subject discussed. Both parties, however, and particularly McLennan, wasted much valuable time in the superfluous task of "beating the air." In his posthumous *Patriarchal Theory*.* McLennan devotes over three hundred and fifty pages to proving that "Sir Henry Maine has only got a single clear instance of agnation (*i.e.*, in the case of Rome) whereby to make it probable that agnation has prevailed everywhere, and with it a single instance of *Patria Potestas*—both occurring in a community by no means barbarous, and neither of them short-lived in that community—whereby to show that *Patria Potestas* and Agnation were universal in the primæval family."†

* Edited by Mr. D. McLennan. London, 1885. It is difficult to say how far this work may be taken to represent J. F. McLennan's views.

† *Patriarchal Theory*, p. 262.

Now whether this conclusion be justifiable or not is really quite immaterial to the author's chief purpose. It is true that Maine insists very strongly upon the prevalence and even universality of the Patriarchal System in early times, and that he makes a great point of the *Patria Potestas* in the strict Roman sense, as being largely at the root of the whole system, but it is difficult to see the great importance of the exact nature of the incidents attending the patriarchal bond in various communities. The mere fact that, at Rome, the Patriarchal system was accompanied by various incidents, such as the *patria potestas*, the *jus vitae necisque*,* and peculiar rules of inheritance and ownership, does not in any way prove that these are essentials to the system universally. They were in Rome conspicuous features, it is true, and highly significant of the national character of the Romans, but they were almost certainly later growths on the original system—the adventitious products of the Evolution of national sentiment and Law.

Maine, undoubtedly, in some places, insists upon them in a manner which suggests their being of the essence of the system, but, as a matter of fact, he does not maintain, for a moment, that the Patriarchalism of India and the Slav countries contained all the ingredients of the Roman System. I am not aware that Maine has ever directly asserted, even in his *Village Communities*, the existence of anything resembling the distinctive form of the Roman *Patria Potestas* in the old Household Communities of India. What he does insist upon as common to all cases of the Patriarchal System mentioned by him, are two very salient features: Firstly, a basis of kinship through males, involving the idea of groups claiming to be related in blood by reason of real or feigned descent from a common ancestor; and secondly, as a corollary, a species of proprietary Com-

* *Patriarchal Theory*, p. 262.

munism consequential upon this, but evidenced in different ways and degrees in different Communities. These two ideas, especially the former, appear to represent the essence of the Patriarchal Theory, in so far as it is in serious opposition to the McLennan theory of the genesis of Human Society.

What I have said as to the paucity of instances of the Patriarchal System in its strictest sense, applies also to McLennan's further objection that it is extremely difficult to believe that such a highly complex system was "primordial and universal." Such a phenomenon, he urges, is utterly improbable; it is like "Minerva springing fully armed from the head of Jove."* As already pointed out, Maine has to some extent justly invoked this criticism by dwelling too much in his early writings upon Patriarchalism as a primary, not to say *the* primary social fact. My criticism of McLennan would be, not that his objections are unprovoked or irrelevant, but that they do not, in his more argumentative works, deal with the most material point at issue.

In his earlier writings McLennan assumes a much more defensible, because more positive, attitude. He leaves negative criticism of hostile theories, for the most part, on one side, in his endeavour to deduce from the array of facts at his disposal some counter-theory, which must be in itself inconsistent with the Patriarchal Theory as originally expounded by Maine.

It is with the merits of this positive side of the attitude assumed by McLennan that I wish to deal, somewhat minutely, in the rest of this Paper. Maine himself, in his *Early Law and Custom*, hit upon some of its weakest points, but there are several other considerations of paramount importance which he apparently overlooked. In spite of this his criticism does certainly seem to possess more

* *Patriarchal Theory*, p. 26.

force, and so, indirectly to give more support to his own theory than most of the positive arguments elsewhere adduced by him in favour of the latter. With this in view I shall endeavour to consider, in some detail, the chief points in the indictment against the theory of the genesis of Human Society usually identified with the McLennan School. Having first ascertained the exact nature of this theory I shall attempt to point out, as briefly as the subject will permit, the chief objections to it. I shall then proceed to suggest some answer to these objections by shewing that certain important deductions of the McLennan School are not warranted by the facts on which they purport to be based, and, in any case, are not essential to the validity of the theory in its broader and more general principles.

Regarding the precise nature of the "Horde Theory" advocated by the writers of the McLennan School, we are met by the initial difficulty of a diversity of opinion even among the various members of the School. On a closer scrutiny, however, it becomes apparent that these differences are rather superficial than real, and rather of detail than of principle. I shall have occasion to notice some instances of this later on, especially in the conflicting ideas of Morgan and McLennan as to the origin of Exogamy and exogamous Totem clans. Meanwhile it is sufficient to observe that such influential authorities as Tylor, Lubbock, Morgan, Lang, Bachofen, Starcke, and, to some extent, Spencer, have more or less fully adopted the Horde Theory. While at times widely differing on particular points, and even severely criticising each other's views, they are unanimous in their condemnation of the Patriarchalism advocated by Maine, and in their assertion of the more important principles which form the groundwork of the McLennan Theory.

Herbert Spencer has, in the first volume of his *Principles of Sociology*, epitomised the theory ably, and, on the whole,

fairly,* while Andrew Lang has attempted a similar task in one of his interesting contributions to the subject of Primitive Society.† Neither of these writers, however, brings out sufficiently clearly the order of sequence in the various stages of the development of Communities which is essential to any statement of a definite and coherent theory on the subject. This, indeed, is not to be wondered at, since it is a noteworthy fact that the most hazy and unsatisfactory portion of McLennan's work is that which treats of the genesis and exact nature of the clans or *gentes* into which primitive tribes came to be universally divided. For our present purpose, perhaps, I may suggest the following as a fairly accurate and impartial summary of those elements underlying the Horde Theory which are common to all writers who advocate it.

In the earliest times, when we first find traces of mankind, men lived in homogeneous aggregates or hordes. These hordes, whether large or small—and it seems extremely probable that in the earliest times they were very small—were scattered over wide areas and owed their origin purely to the gregarious instincts of man.

At a certain stage in their development, these hordes became split up into smaller groups known in later times as clans, septs or *gentes*, independent of each other, but all held together by the fact that they jointly constituted the horde or tribe. One factor in the production of these clans was the system of kinship through females only, this however, being but a secondary factor; opinions differing as to the primary generating influence. These clans, in an infinite number of cases, though theoretically based on a common descent from common ancestors, lost, at a later stage, the true idea of their origin, and were metamorphosed

* Vol. I., p. 642.

† *Encyc. Brit.*, 9th Ed., Art. "Family."

into those remarkable Totem clans, with which modern research has made us so familiar.*

Finally, in all nations which were distinguished by superior intellectual* development, including, of course, all modern civilised nations, a period arrived when, through the growth of a combination of ideas, more especially that of the superior importance of paternity to maternity, and the obvious expediency of paternal property devolving upon children rather than on the *gens* or clan, together with the influence of local contiguity and territorialisation, the old clans gradually died out altogether, or became entirely altered in their nature and constitution. It was at this latter stage that Patriarchalism began to manifest itself, and, as in the striking case of Roine, rapidly effaced the traces and even the memory of the old system of *gentes*.

This, then, represents the barest outline of the Horde Theory, and it appears at the first glance fairly plausible, but there are incidental matters connected with it which afford material for half-a-dozen schools of controversy. Indeed, they represent the fragments by the aid of which the main fabric of the theory was constructed. The whole of McLennan's work on the subject is a remarkable specimen of *à priori* reasoning. He started on a firm enough basis. He saw all over the globe savage peoples living in a state of barbarism, which, he justly assumed, represented simply a survival in modern times of a condition of things once universal. These peoples were divided into tribes, which were themselves split up into clans or *gentes*. These clans, he inferred, were in the past history of civilised nations the germs from which such nations sprang—

* [For recent contributions to this branch of study, cf. *Archæological Review*, Vol. III., 1889, pp. 217, 350, *Totemism in Britain*, by G. L. Gomme: *op. cit.*, III., p. 145, *Are there Totem clans in the Old Testament*, by Joseph Jacobs, and IV., 1889-90, p. 152, *Quasi-Totemistic Personal Names in Wales*, by A. N. Palmer.—ED.]

the starting point in the evolution of mankind from a state of incoherent homogeneity. The difficulty was to fill up the great historical blank which stretched out beyond them.

In scrutinising carefully the nature and customs of these savage tribes and clans, McLennan and other observers discovered several, at first sight, inexplicable phenomena, which manifested themselves among such people practically all the world over. The more important of these were:—The almost universal prevalence of a system of kinship through females exclusively; the consistent practice of Exogamy among the clans which went to make up a tribe; the peculiar bonds which bound together the members of a clan, especially the fact of a supposed descent from a common ancestor; and finally the existence of Polyandry, or polyandrous practices, among many scattered tribes now existing, together with very clear traces of it, in the shape of the so-called Levirate and the Niyoga,* among civilised or half-civilised nations of the present day.

Starting with these phenomena as facts, McLennan proceeds to reason step by step, and, in the end, from the dry bones of present day customs and traditions, builds up a more or less complete vivid historical study.

Beginning with the most significant fact, the existence of exclusive female kinship, he finds its probable, and, from his point of view, only possible, cause in the uncertainty of paternity and the certainty of motherhood. Then, advancing one step further, he postulates a primitive state of what Sir John Lubbock euphemistically calls “Communal marriage” as being the only reasonable basis of such an uncertainty of fatherhood.

* [Cf. Nelson, *Scientific Study of Hindū Law*, London and Madras, 1881, p. 188. Mayne, *Hindu Law and Usage*, Lond. 1878, §§ 65-7, 68, 69, 106-7, 111, 448. Mayne, § 68, denies that the Niyoga is a survival of Polyandry.—ED.]

As to the very general practice of Exogamy, McLennan finds the most obvious cause to be a disparity in the balance of the sexes in the tribe; but, as relative paucity of females has itself to be accounted for, he is led to imagine that it is attributable to the practice of female infanticide being, at a certain stage in early societies, universal and persistent. Then, the very existence of the Totem clans into which a tribe is divided, with the traditions and customs distinguishing such clans, is, he asserts, in every way indicative of a bond of kinship among members of the clans based on a real or fictitious descent from a common ancestor. The co-existence of the exclusive recognition of female kinship in the clans, obviously lends support to this view. The evidence of the prevalence of Polyandry in early times harmonises perfectly, he thinks, with the dual idea of primitive promiscuity and dearth of females. It is an advance upon the former—a halfway stage between it and monogamy; other stages being marked by the Levirate and other modifications of Polyandry.

Summing up the effect of all these indisputable phenomena, McLennan comes to the conclusion that the horde or tribe was in a state of homogeneity until that stage was reached, when by the long-continued action of exogamous practices, coupled with the rule of exclusive kinship through females, it became heterogeneous by being split up into various well-defined stocks or branches. These stocks sooner or later developed into the true Totem clans, as we understand that term nowadays.*

As I shall have occasion to criticise this somewhat closely later on, I merely re-iterate now that McLennan, in the passage referred to, is by no means clear in

* See *Primitive Marriage*, p. 189; and *Studies in Ancient History*. 1886. Pp. 127-8.

expressing his meaning. By the use of the antithetic terms "homogeneity" and "heterogeneity" in connection with the tribes, it is uncertain whether he intends to imply that the tribe down to, though not after, the stage in question, was theoretically free from any infusion of foreign blood recognised as such, or that it was until then a formless aggregate of people, and only after that stage became divided into clans or *gentes*.

It is more reasonable to suppose that the latter was the idea which he meant to convey; and, in any case, he clearly implies that previous to the infusion of foreign blood the tribe was undivided into any smaller stocks.

To return to the McLennan theory as a whole, it is obvious that it serves to explain the peculiar phenomena observable in infant Societies better than the Patriarchal Theory. These phenomena prove beyond all reasonable doubt that there are long stages in the history of the development of Primitive Societies anterior to the first traces of Patriarchalism. Any arguments against the Horde Theory, however forcible, cannot in themselves interfere with this fact or re-establish and rehabilitate Maine's views as a sufficient or substantial theory of universal application.

There are, however, certain objections of a very serious character, which must be considered and answered before we can accept the theory of the McLennan School in any degree of completeness.

Undoubtedly one of the chief difficulties is that raised by two such formidable opponents as Maine and Herbert Spencer, as to the existence of "Communal Marriage" in the earliest times. From McLennan's point of view, the importance of this is obvious, as the assumption forms the sole ground upon which he and others base their explanation of female kinship.

Maine admits, as already shewn, that "it cannot be doubted that phenomena exist which do suggest such a

relation of the sexes as may be supposed to leave the paternity of children in much uncertainty." While admitting, however, that promiscuity may be referred to a later stage of history, he denies that it could have been the original condition of mankind. He cites the works of so eminent an authority as Charles Darwin for the position that: "We may conclude from what we know of all male quadrupeds that promiscuous intercourse in a state of nature is extremely improbable. . . . If we look far enough back in the stream of time it is exceedingly improbable that primæval men and women lived promiscuously together. . . . In primæval times men would probably have lived as polygamists or temporarily monogamists."* He also appeals to the authority of Letourneau (*La Sociologie*, p. 379) and Le Bon (*L'homme et les Sociétés*, II., 284) in support of Darwin's views. He then proceeds to argue that even if promiscuity had originally existed, it would not necessarily have involved uncertainty of paternity.

"A human being can no more, physiologically, be the child of two fathers than of two mothers, and the children of the same man, no less than the children of the same woman, must always have had something in their nature which distinguished them from every other group of human beings."†

The fallacy in this argument is, I think, exposed by a subsequent *dictum* of Maine's to the effect that uncertainty of paternity is "not a fact of human nature but of human knowledge." Surely, for all practical purposes, as an explanation of the exclusive recognition of kinship through females, the question of human *knowledge* is just the one which is material! Something more than the mere instincts of human nature are necessary for the establishment of those remarkable primitive ideas of relationship which

* *Descent of Man*, II., 362, *et seq.*

† *Early Law and Custom*, p. 202.

Morgan and others have made the basis of such elaborate theories.*

Maine's suggestion that promiscuity might have been the product of a later era, or the result of a dearth of women is plausible enough as an explanation of such cases as those mentioned by Classical writers,† and isolated modern cases, but an admission of it without any other attempt to explain the existence of female kinship would be fatal to the theory which assigns the latter to the earliest period of human history. Some other explanation is necessary, and Herbert Spencer's appears to be a very satisfactory one.

In his *Principles of Sociology*,‡ Spencer attacks the McLennan idea of primitive promiscuity with a severity equal to that of Maine, and comes to the conclusion that the facts do not warrant the assumption that promiscuity ever existed in an unqualified form. Reasoning from a more purely scientific point of view than Maine, he bases his contention throughout upon an undisguised belief in the necessity of applying the principle of selection to any speculation on the subject. The natural self-assertiveness of the fittest, he argues, must be recognised as an essential factor in moulding primitive sexual relationships.

Admitting that there was an absence of all moral restraint, he thinks that the mere fact of strength and the desire to monopolise property of any description conducing to pleasure, would suffice to prevent absolute promiscuity. "We must infer that even in prehistoric times promiscuity was checked by the establishment of individual connections, prompted by men's likings and maintained against other men by force."§

* *System of Consanguinity*, and other works.

† E.g., Herodotus, IV., 104 and 180; V., 172; and I., 216. Aristotle, *Politics* II., 3, 9, &c. ‡ Vol. I., p. 662.

§ *Principles of Sociology*, I., p. 662. For some instructive remarks on this aspect of the question, see Walter Bagehot's *Physics and Politics*, pp. 125-126.

He comes to the conclusion that, in primitive times the unions of men and women were not of long duration, and notices the case of the Andamanese Islanders to-day, among whom the union ceases after the child is weaned. Men were, in fact, in Maine's words "*temporary monogamists*." Children would grow up with their mother, and unless the union was one of many years' duration, they could hardly become very much identified with their father. In any case "*the child would be mostly thought of in connection with its mother*." "We are not obliged to make the startling assumption that male parentage was at first entirely unperceived . . . it is habitually known though disregarded, where the system of kinship through the female line now obtains."^{*}

It will be remembered, moreover, from numerous instances on record, that the jealousy of possession of a wife did not, and in savage tribes still does not, necessarily prevent immorality and licentiousness somewhat of the nature of promiscuity. Many years ago the present Master of Balliol told us that the Classical religions bore relics of the "ages before morality." The distinction between mere licentiousness and promiscuity as an institution is, however, well marked. Primaevl man would willingly surrender his wife to others, but he did so as an act of friendship and of his own free will. Even this kind of semi-promiscuity appears, as a recent writer suggests,† to have been developed at a subsequent period,—possibly that contemplated by Darwin, when man had "advanced in his intellectual powers, but retrograded in his instincts."

McLennan himself, in the late and expanded edition of his *Primitive Marriage*, seems half willing to admit the possibility that absolute promiscuity never existed. "The unions," he says, "of the sexes were probably in the earliest

* Spencer, *op. cit.*, I., p. 666.

† Starcke, *The Primitive Family*, p. 255.

times loose, transitory and in some degree promiscuous." A few pages later on, however, he evinces a disposition to more positively assert the existence of pure promiscuity. "We are led to contemplate groups indulging in a promiscuity more or less general."

On the whole, it would seem that we are justified in abandoning the idea of primitive promiscuity. Its existence is not, as McLennan at first supposed, a condition precedent to that of kinship through females. It cannot be denied that at certain periods in human history, it was to some extent prevalent. Polyandry and other phenomena compel us to admit that ; but there is simply no ground for holding that it was an original social fact. Where it did occur, whether in its rudest form or in the shape of Polyandry produced by female infanticide or other causes, it would undoubtedly have tended still more cogently to induce the exclusive recognition of maternity and female kinship. Uncertainty of paternity, however, or rather the superior expediency of recognising maternity exclusively for purposes of relationship is, as I have shewn, capable of explanation as well by the assumption of a primitive state of temporary monogamy or polygamy as by the assumption of absolute promiscuity, and the latter is not essential to the general scheme of the McLennan theory. Maine's objections on this head, therefore, may be justifiable, though they may not tend in any way to support his own theory as against that of the McLennan School.

The other chief objection to the McLennan theory is apparently one of detail, *i.e.*, as to the generating cause of Exogamy, but really, as I shall endeavour to shew, one which goes to the root of the whole theory. McLennan, of course, alleges that Exogamy must have arisen from a disparity in the number of males and females in a tribe, produced by female infanticide and other causes, and leading to wife-stealing outside the tribe, and ultimately

to a custom of Exogamy between tribes. Upon this point, the anti-Patriarchal School is very much divided against itself. McLennan, Morgan, and Lubbock each hold antagonistic views, while Spencer differs from all the others. It is not necessary here to enter into any elaborate criticism of the relative merits of these various opinions. As regards McLennan's view, Spencer's objections appear to be practically unanswerable. They are virtually three in number, viz. : (1.) That where wife-stealing is now practised the tribe is almost invariably polygamous. (2.) That it is by no means certain that female infanticide would in any case have had any further effect than that of keeping the number of women on a level with that of men in a given tribe. There were a great many causes such as war, adventure, sexual jealousies, etc., tending to keep down the number of men, which would not affect women in the same way, or at any rate to the same extent. (3.) And finally if, as McLennan asserts, this dearth of females was a phenomenon common to all Societies, "at a certain stage in *every* race of mankind," how could stealing from outside any particular tribe remedy the state of things? "If each tribe had fewer women than men, how," asks Spencer, "could the tribes get wived by taking one another's women?" *

Spencer's suggestion in lieu of McLennan's view, though in some respects less open to objection, is hardly more satisfactory. He bases Exogamy on the capture of women in a successful war. "What more natural than that where many warriors of the tribe are distinguished by stolen wives, the stealing of a wife should have become the required proof of fitness to have one? Hence would follow a peremptory law of exogamy." † One cannot help thinking that this line of argument does not exhibit the logical force which so often carries conviction to the mind of the reader

of Herbert Spencer's works. Even granting the validity of his assumption, the conclusion strikes one as very lame, and unsupported by the premisses.

Sir John Lubbock's idea is somewhat similar. He also attributes the origin of Exogamy to capture in war, but he makes it the transitional step from the earlier "Communal marriage" to what we may call monandrous unions. The title of captor, he thinks, was the one title which would take a woman out of the Communal system of promiscuity. A valiant warrior, returning to his tribe with spoils of war, whether in the shape of women or weapons, or other "chattels," could monopolise the enjoyment of his hardly-earned trophies, to the exclusion of the generally prevalent custom of Communal ownership.* Unfortunately, Lubbock's view is based on an assumption of Communism in the tribe which is quite unsupported by facts. The theory, moreover, though it may be a good explanation of the origin of monandrous unions, affords no reasonable explanation whatever of the practice of Exogamy.

Morgan, with that tendency to make voluntary action based on human experience the greatest factor in the development of Societies, which characterises all his works, grounds Exogamy upon a perception of the inexpediency of interbreeding. He thinks that men early discovered the evil of close interbreeding, and that this led the tribe to split itself into "exogamous clans." This is a very important suggestion indeed, as it goes to the root of the whole theory of the origin of clans, and other tribal divisions. It makes them artificial in their origin, rather than the outcome of purely natural and gradual causes.

It might be observed, in passing, that if (as I think we may assume to be the fact) intermarriage of relatives does cause a deterioration and degeneration in the race, Morgan's

* *Origin of Civilisation*, p. 104, etc.

view might be true in a different sense from what he intended. The same *natural* causes which would have tended to efface promiscuity from primitive communities, would also tend to encourage Exogamy. To be more explicit, Exogamy, by tending to produce a fitter race, would also tend to establish races practising it at the expense of purely endogamous races, by the mere process of natural selection. The more exogamous, and therefore physically fitter, would survive both among individuals and societies. From this point of view, Exogamy, though based upon the same physiological reasons as those which underlie Morgan's theory, would be natural and not artificial.

If Morgan's view, however, be true, it not only upsets McLennan's view of the origin of Exogamy, but also conflicts with the general theory of the McLennan School as to the origin of tribal clans.

This raises a question concerning Exogamy of far greater moment than that which we have just been discussing as to its proximate cause, namely, at what stage in the development of primitive tribes do clans appear, and are they evolved gradually and naturally, or are they the result of a purely empirical division of the tribe by some sagacious chieftain, or by the voluntary decision of the tribe?

Tylor, in his *Early History of Mankind*, mentions a curious tradition which, if authentic, is an illustration of the latter idea. In noticing the fact that the Chinese people are divided into a number of clans, 300 according to some writers, 1,000 according to others,—he says that the Chinese refer the origin of these clans to the Emperor Fu-tu, *circa* B.C. 2207, who first divided the people into 100 clans, giving each a distinctive name, and forbidding inter-marriage *within* the clan.* Tylor himself does not attempt

* *Op. cit.*, p. 280, ch. x., on "Some Remarkable Customs."

any generalisation from this; in fact, he expressly says that, "In any full discussion other points have to be considered, such as the wish to bind different tribes together in friendship by intermarriage, and the opinion that a wife is a slave to be stolen from a stranger, not taken from a man's own people."* The tradition is, however, curious, though probably deserving of little weight. It seems altogether unlikely, not to say impossible, that tribes could have remained in a shapeless state of homogeneity until a time when, by a sudden voluntary act on the part of a chief or of the people, this was suspended by a disintegration into distinctive clans or *gentes*. Such an idea is contrary to all the analogies afforded by our knowledge of the gradual development of all organisms. We can hardly believe that the process of evolution in societies has not been spontaneous and gradual, as in all other phases of the Universe. That such an event as is suggested in the Chinese legend may have taken place, is probable enough, but it must have been merely a re-organisation or confirmation of a previously existing state of things. Whether also the mere rule and practice of Exogamy may not have been artificially produced in the first instance, is a totally different matter, which well deserves the consideration bestowed upon it by Morgan; but even if so, the process must have been altogether independent of the production of clan divisions in the tribe.

It is, in fact, necessary to go further than this, and to say that the origin of Exogamy must not only have been independent of, but subsequent to, the evolution of the clan system in the tribe. This proposition is not lightly asserted, since it is clear that it is in complete contradiction to the views of both McLennan and Morgan on the subject. It is just here, as it seems to me, that there arises the most serious stumbling block in the way of the complete

* Tylor, *op. cit.*, &c., p. 286.

acceptance of the McLennan theory, and a careful consideration leads me inevitably to the conclusion that the difficulty is fatal to the Theory as it at present stands.

The passage of McLennan's work most concisely dealing with this point has been already referred to. In it, he clearly enunciates the principle that not until after the establishment of the practice of Exogamy did the germ of the clan system become visible. He goes even further than this, and asserts that the Clan system was wholly and entirely the outcome of Exogamy coupled with kinship through females. The objections to this view are very important and weighty. They apply irrespectively of any consideration of the origin of Exogamy.

McLennan commences the carefully worded principle in which he summarises the "stages of progress" traversed by primitive societies, as follows:—

"1. That primitive groups were, or were assumed to be, homogeneous.

"2. That the system of kinship through females only tended to render the exogamous groups heterogeneous, and thus to supersede the capturing of wives."*

A little further on he elaborates this idea in the words already quoted. "We conclude that we must regard the primitive groups as having been or having been assumed to be homogeneous up to that stage when through the joint operation of exogamy, and the system of kinship through females only, foreigners recognised as such began to be born within them."

So in his later work he says, "Heterogeneity as a statical force can only have come into play when a system of kinship led the hordes to look on the children of foreign women as belonging to the stocks of their mother, that is, when the sentiments which grew up with the system of kinship

* *Primitive Marriage*, p. 181. *Studies in Anc. Hist.*, 1886, p. 128.

*became so strong as to overmaster the old filiation to the group (and its stock) of children born within it.**

The obvious meaning of these passages is, as has already been pointed out, that the Tribe or Horde was practically undivided into clans or stocks recognised as such until by the introduction of aliens by means of Exogamy, exogamous (Totem) clans or stocks began to be formed within the tribe. The idea of kinship must have pre-existed this stage McLennan admits,† and so a conception of stock must have already arisen, but neither of these had as yet been sufficiently powerful to "overmaster the old filiation to the group."

There are two principal objections to this theory: *firstly*, there is no evidence against, and everything in favour of the existence of stocks, clans or *gentes* within the tribe prior even to the origin of Exogamy; and *secondly*, on McLennan's hypothesis it is difficult to see how such subdivision could ever have arisen.

It seems tolerably certain, that if any system of kinship whatever was in vogue among Primitive Societies, rudimentary stocks, based on collateral relationship formed by descent from a common ancestor, must have arisen at a very early period indeed. McLennan argues somewhat loosely in one place,‡ that the earliest human groups could have had no idea of kinship, in spite of the filial and paternal affections being instinctive. Individuals, he asserts, were affiliated not to persons, but to some group. What he means by this "group" is uncertain, but the proposition is in any case a startling one, and quite repugnant to our ideas of human nature. It is extremely difficult to imagine any human groups which at any time had "no idea of kinship;" indeed the obvious criticism of such a

* *Studies in Ancient History*, 1886, p. 127. † *Studies, Anc. Hist.*, p. 127.

‡ *Studies in Ancient History*, pp. 83, seq., & 127, seq.

suggestion may be couched in McLennan's own words: "Once a man has perceived the fact of consanguinity in the simplest case, namely, that he has his mother's blood in his veins, he may quickly see that he is of the same blood with her other children." What would have prevented the perception of this fact and the natural consequence of such a perception at the earliest possible era of human history? In a community in which paternity was certain, this must have taken place. Why should a different state of things be conceived in a society in which uncertainty of paternity or some other cause necessitated the preferential recognition of motherhood? At any rate, it is impossible to assign the origin of the primary idea of kinship to so late a period as McLennan suggests. As surely as the Family, in the purely social sense of the term, namely the union between parent and child, must have existed from the beginning, so surely must the bond of common descent have been a potent factor from the very earliest times in producing some tendency towards disintegration in the Tribe or Horde. The children must have gathered round the mother. The death of the mother could not have wholly broken the bond of union, and so mere habit during the most impressionable period of life, apart from the undefinable community of instincts necessarily inherent in children of the same parent or parents would to some extent have kept the children together. The same thing would apply in the case of children's children, and even in succeeding generations it is highly probable that at a very early stage the transmitted feeling of kinship would tend to bind together individuals long after any real union had ceased to exist.

Thus there is no apparent reason why, even in the absence of any such influence as Exogamy, the homogeneous condition of the Horde or Tribe should not have gradually developed into one of heterogeneity. Undoubtedly the

infusion of a foreign element into the Tribe where it occurred would favour this process, but homogeneity and heterogeneity are purely relative terms, and there might have been a transition from the one to the other within a more restricted radius, without the intervention of any such factor as Exogamy. The ordinary process of evolution within the tribe would, as I have pointed out, have been quite sufficient to produce such an effect.

McLennan, however, feeling that the presence of Exogamy in savage tribes must in some way be accounted for, chose to make it play the chief part in his theory of the evolution of the Clan system. Apart from polemical expediency, there was no reason whatever for the assumption that Exogamy preceded or conduced to the formation of clans in a tribe. Even on Morgan's hypothesis, this assertion would hold good. The arbitrary creation of a rule of Exogamy might have taken place, and in fact almost certainly did take place, independently of and subsequently to the natural evolution of the Clan system.

McLennan's view, however, implies an assumption that *the clans of any given Horde or Tribe were the direct result of the introduction of aliens into it.* The alien women introduced into the Tribe in accordance with the principle of Exogamy, created new lines of descendants through the operation of exclusive female kinship which were in name strangers to the tribe in which they lived. The result of this would have been, that after the principle of Exogamy had been sufficiently long in practice, a tribe would have become split up into sub-divisions consisting: (a) of the main stock (or, as I submit, stocks) comprising the descendants of the original members of the Horde or group, together with (b) other stocks or clans, each comprising descendants of some common female ancestor who was an alien stolen or purchased from a different Horde altogether.

The first objection to this view is pretty obvious. On McLennan's hypothesis, during the epoch of Tribal Exogamy, at any rate after the idea of kinship had properly arisen, every alien woman introduced into the tribe must have founded a new alien stock within that tribe. The rule of female kinship would have ensured this. Hence such a woman would have been the source from whence sprang the stock which afterwards developed into a clan or *gens*. Now, in order that Exogamy, in the sense of occasional and enforced wife-capture, might have grown into a hard and fast custom, as the McLennan School suggest that it did, it must have been for a very long time the incessant and almost unanimous practice. This, however, would mean the introduction of an infinite number of alien women into the Tribe, and the consequent establishment of an equally infinite number of new stocks or groups. There would indeed, even after a very few generations, have been relatively as many stocks as families within the Tribe ; which is absurd and incredible, and not borne out by facts. Very few savage tribes now known to us are split up into more than a dozen clans, indeed the average number is considerably less. A superficial reference to those parts of Morgan's erudite works which treat of the Tribal arrangements of the North American Indians and the Aborigines of Australia will suffice to prove this. In any case, the ever-increasing multiplicity of the stocks would in itself have prevented the regular evolution of well defined clans, which would otherwise have been gradually produced from a primæval Horde, small in the number of its original members, and isolated in situation.

Various suggestions might perhaps be made in answer to the objection thus raised, but it does not appear that they will stand the test of a careful examination. We may imagine that in the process of inter-tribal Exogamy, certain things happened which would avoid the otherwise

inevitable multiplicity of stocks. For instance, we might assume that on the introduction of an alien woman into her husband's tribe, her connection with her original community vanished, and her children traced their relationship not through their mother according to the prevalent rules but through their father. The position of such a woman would have exactly conformed to the description of the status of Roman matrons contained in the old maxim *mulier est origo et finis familiae*. To admit that, however, would be to throw over the whole theory of female kinship in the face of overwhelming evidence of its existence, and the frequently expressed opinion not only of McLennan, but of all the advocates of the Horde theory. This suggestion therefore fails.

If, as an alternative, the idea be adopted that the husband went into the wife's tribe on marriage instead of bringing her into his own, then the whole principle of marriage by capture and exogamy as advocated by McLennan falls to the ground. There are, no doubt, traces of a practice of a somewhat analogous kind, within the tribe as between members of the same tribe, but this is really a very different phenomenon and one far more easily explained. The best instance of it is to be found in the Nair system of marriage, a modified form of Polyandry, in which the wife receives her husbands at her own or her mother's home.* So it seems likely that wherever Polyandry was in vogue in a tribe, a similar practice would at all events at first have been the result. Apart from the fact that, as Morgan points out, there "is no evidence of the general prevalence of the

* See Buchanan, *Journey from Madras*, 1807, [ii. p. 411, seq.] and McLennan, *Primitive Marriage*, p. 516. [Cf. Mayne, *Hindu Law and Usage*, Lond. 1878, §§ 58, 200, 205, and Nelson, *Scientific Study of Hindū Law*, Lond. and Madras, 1881, pp. 116 n., 188. Nelson, p. 116, doubts the truth of much of Buchanan's story.—Ed.]

Nair system,"* there is also no ground for connecting such phenomena with a period in the history of mankind anterior to the existence of clans.

From the practical point of view, too, it is quite unreasonable to suppose that such a practice could have occurred at all systematically as between tribe and tribe or horde and horde.

The only other alternative attempt to explain away the difficulties encumbering McLennan's position, is by assuming that the alien wife brought into her husband's tribe and retained there her original racial identity, and transmitted the same to her descendants in accordance with the rule of female kinship. *Ex hypothesi*, however, this must have occurred before the existence of clan divisions, and therefore any alien element so introduced must have been a tribal one and not based on the Clan system. This is entirely unsatisfactory. It places us in the untenable position of believing that a particular tribe allowed the existence in its midst of a fraction of a totally alien and perhaps hostile tribe, recognised as such. Moreover, this alien stock would, necessarily, have retained its original generic name, and we should therefore reasonably expect to find some traces of this among the savage tribes of the present day. There is, however, no evidence whatever of any such phenomenon.

It thus appears that no sufficient answer can be adduced to the objection which I have brought against McLennan's view as to the origin of the Clan system. A much wider question, however, has now to be considered. Is there any reasonable basis for the belief that Exogamy ever existed at all as *between tribes or hordes*? If this question can be

* *Anc. Society*, p. 516. [Mayne, *Hindu Law*, § 59, speaking of Polyandry among Aryans, says that the cases cited by McLennan seem to be less like the voice of a living law, than the feeble echoes of one sounding from a past that is dead.—ED.]

answered in the negative, it is clear that McLennan's Theory, on this head, collapses entirely.

That Exogamy, in its restricted sense, *i.e.*, as an occasional practice of wife-capture from an alien tribe, did in fact exist is of course beyond dispute. Not even Maine or Morgan has doubted that. Indeed, the former, in *Early Law and Custom*, almost goes out of his way to cite some striking and well-authenticated instances of it.* When we come to deal with Exogamy in McLennan's sense, however, as a persistent and consistent custom of *marrying outside the tribe*, there does not appear to be a shadow of real evidence that it ever existed.

Maine, it will be remembered, has a remarkable dictum which is very relevant to the question now under consideration. "Is there," he asks, "any Society which is not at the same time exogamous and endogamous? Thus Roman Society was both exogamous and endogamous, there was both an outer and an inner limit. The double rule is found in Hindu Law. A Hindu may not marry a woman belonging to the same *gotra*, all members of the *gotra* being theoretically supposed to have descended from the same ancestor, but then he *must* marry within his own caste."†

Morgan goes much farther even than this. He explicitly denies the existence at any time of inter-tribal Exogamy. "There is not," he says, "the slightest probability that exogamy ever existed in a tribe composed of *gentes* in any part of the earth. Wherever the Gentile organisation has been found, inter-marriage in the *gens* is forbidden. . . . The *gens* is exogamous, but the tribe is endogamous."‡

A very recent Danish writer, C. N. Starcke, thinks it scarcely credible that McLennan, Spencer and Lubbock

* [E.g., among the Southern Slavs, *op. cit.*, p. 254.—Ed.]

† *Early Law and Custom*, p. 222.

‡ *Ancient Society*, p. 512.

should not have observed that everything tends to disprove the existence of Exogamy between tribes.* I might, in passing, allude to a remark made by the same writer, to the effect that the clan did not always exist. I have already expressed an opinion that the germ of the Clan system must have appeared at a very early stage indeed, as early in fact as the recognition of blood relationship itself; but whether this be so or not, Mr. Starcke's conclusion is scarcely justified by the reason stated by him "that tribes in which there are no clans may still be found." The natural tendency of progress in a Society would be towards the re-integration of the Society as far as the larger clan divisions were concerned, and its disintegration into a state of greater heterogeneity. This has been an undoubted phenomenon in the history of most civilised societies at some time or other, and might easily have occurred in isolated instances even in less advanced communities.

Reverting, however, to the main question: if we are to regard the McLennan Theory of inter-tribal Exogamy as untenable—as it would seem that we are entitled to do—it follows that McLennan's explanation of the origin of clans and *gentes* also fails. There appears to be no valid ground—even of argumentative expediency—for the retention of this phase of the Theory. The origin of clans can, as I have repeatedly insisted, be found in the natural disintegration of a Society upon the basis of blood relationship. To labour hard to introduce so improbable a factor as Exogamy or some other external influence into the matter is quite a work of supererogation.

As to Exogamy itself, there is every reason to believe that it originated as a custom, between clans, after the latter had acquired a more or less definite form. It is a very singular fact that J. F. McLennan, himself, appears,

* *The Primitive Family*, p. 222.

shortly before his lamented death, to have entertained grave doubts as the soundness of his Theory in this respect. Unfortunately, he did not live to give us the benefit of his modified views on the subject, but his brother, Mr. Donald McLennan, in his preface to the posthumous work on *The Patriarchal Theory*, has some extremely suggestive remarks on the point. "It was," he says, "a part of his (Mr. J. F. McLennan's) design to set forth a theory of the origin of Exogamy and to gather together the facts, very numerous and falling into several classes, by which that theory could be supported. . . . As the theory of the origin of Exogamy took shape, and other facts connected with it reduced themselves to form in his mind, *the conclusion was reached that the system conveniently called 'Totemism' must have been established in rude societies prior to the origin of Exogamy.*"*

This admission, in so far as it may be taken to accurately represent Mr. J. F. McLennan's views, is highly significant. Whether it shews that Mr. McLennan was tending to surrender his whole position on the subject of the origin of Totem clans is perhaps questionable, but it certainly implies this to a great extent.

In any case, if my contention on the subject of the Evolution of the Clan system is a valid one, not only does the idea of inter-tribal Exogamy become unnecessary as well as unhistorical, but the phenomena which are assumed by Mr. McLennan to have produced such Exogamy become equally unnecessary. We may thus dispense with marriage by capture, and its *causa causans*, dearth of women, based on female infanticide, as *essential* factors in the genesis of Society.

* *The Patriarchal Theory*. Preface, p. vi. In the Preface to the 1886 Edition of *Studies in Ancient History*, Mr. Donald McLennan states his intention of publishing another posthumous volume of his brother's writings. If this intention is realised, fresh light will possibly be thrown on this point.

Exogamy, as between the constituent clans of a tribe, cannot of course be ignored. The most plausible theory of its origin is probably that of which Morgan is, to some extent, the exponent, *i.e.*, the perception of the utility of marriage outside a certain circle of kinship. It seems certain that a repugnance to incest appears in mankind at a very early period of history. We need not here discuss how this first arose. The old maxim, "Familiarity breeds contempt," might be a sufficient explanation. The doctrine of hereditary transmission of instincts, jointly with that of natural selection in the individual and the tribe, would account for the perpetuation of this sentiment. This bias would develop, more or less, *pari passu* with the development of human societies. Whereas in earlier times the repugnance would only extend to cases of marriage of very near relatives, as time went on it would go much further. As the Clan system became more definite, and finally established itself as the unit of the tribal system, it can easily be imagined that the well-defined barriers of the clan would become the most probable because most convenient limits of the application of the Exogamous principle. Exogamy itself would always have tended to render the system of clans or *gentes* more definite and coherent, and thus the two elements would constantly have acted and reacted on each other.

This question is not, however, very material to the consideration of the development of the Clan system, if once we admit that Exogamy is a phenomenon posterior to the latter. With the complete establishment of the Clan system, based on female kinship, we reach a stage in the history of human societies which brings us to comparatively firm ground. We are almost on the margin of historical times.

The later phases of development are clearer and more easily accounted for. Fictions such as adoption, artificial bonds such as slavery and *clientela*, and voluntary ac-

tions must have helped to swell the size of the clans and quicken their natural growth. We are quite certain that in the case of many modern civilised nations there must have been an epoch at which a transition was effected from the rule of exclusive female kinship to that of exclusive male relationship. Much later, as Lubbock points out, this itself must have been superseded by a joint recognition of blood relationship on both sides, as in the Roman *Prætorian* institution of limited cognatic succession, which reached its fullest development in the famous 118th *Novel* of Justinian. It is uncertain what were the immediate causes of this first transition. The territorialisation of the Tribe, the fact that marriage unions in process of time became more permanent; proprietary considerations, and especially the obvious expediency of paternal goods descending to children instead of to the clan or *gens*; and many other influences, must sooner or later have produced a certainty of paternity or a tendency towards the recognition of kinship through males. The advantage of such a mode of tracing relationship must have become more and more obvious.

Then, as McLennan points out, "the first effect of kinship through males would be to arrest the progress of heterogeneity," meaning apparently the more boldly outlined through imperfect heterogeneity of the *Clan* system, since that of the *Family* system and of *Patriarchalism* was a much more perfect and coherent form.

At what time in the history of clans, the idea of *Totemism*, as we now know it, arose, we cannot say. The germs of the elements composing it must have grown up concurrently with the *Clan* system itself. The more artificial and adventitious elements, such as the peculiar names, rites and body markings, were probably of comparatively later date. The idea of an ancestor from which the clan was supposed to be descended and after whom it was named, represents doubtless a historical truth clothed in much grotesque fiction.

Totemism, however, is almost a subject in itself, but one of which it would be beyond the scope of the present Paper to enter into any detailed examination. Its influence upon the Clan system was, of course, immense. The common religious rites, burial place, and name which it involved, probably did more than anything else to mould the clan into distinctiveness and to maintain and perpetuate its identity. Beyond this, its influence is one which relates to a period posterior to the general range of the subject which we have here been discussing.

I have endeavoured in the preceding pages to criticise some of the weakest points in the Theory of the McLennan School as to the origin of Primitive Society. What I have attempted to demonstrate, and what I would again urge, in conclusion, is this:—That these fallacies do not necessarily imperil the validity of the Theory as a whole, nor tend in any way to establish the Patriarchal Theory of Maine. Sufficient remains, and amply sufficient, to prove that McLennan, Morgan, and others have hit upon the fundamental phenomena which mark the evolution of archaic communities, and Patriarchalism is not one of them. There is a tendency, however, in certain quarters, at the present time, to regard McLennan's views, not only as superseding Maine's Theory, but as being satisfactory and invulnerable in every detail. This, I submit, is a mere delusion, which ought not to be entertained for a moment. The Horde Theory, if it is to stand at all, must be built on foundations at least sound enough to endure the test of superficial adverse criticism such as has been offered in the foregoing pages. It is only by a proper appreciation of this fact, that the vast importance of McLennan's work can be duly estimated, and the interests of the subject on which he laboured so untiringly be best advanced.

JOHN M. GOVER.

Quarterly Notes.

The Liverpool Conference on the Law of Nations.

As we are at press, the final arrangements are being made for the Fourteenth Conference of the Association for the Reform and Codification of the Law of Nations, to be held at Liverpool. It is understood that one of the prominent features of the work of this representative gathering will be the consideration of the York-Antwerp Rules of General Average, with a view to their modification in any way which may be suggested by the experience gained since the Antwerp Conference in 1877, under the Presidency of Lord O'Hagan. Thirteen years must have done much towards enabling the Association to acquire a mass of information concerning the practical working of these widely adopted Rules, and so to place it in the best possible position for framing new Rules, or for modifying those framed at Antwerp in the most advantageous manner for the great maritime interests concerned. Although the Conference cannot but regret the loss of the distinguished Lord of Appeal who presided over several of the sittings of the General Average Committee at Antwerp, yet the energy of the present able Chairman of the Executive Council, Dr. E. E. Wendt, is well known to all who are interested in the Reform of Maritime Law, and Liverpool itself may be expected now, as on the occasion of a previous Conference of the Association, to contribute her quota of able and zealous Maritime Law Reformers. The interesting but very complicated question of Territorial Waters will no doubt be brought forward, in connection with a Report of the progress made by the Committee appointed at the Guildhall Conference, where the subject was ably treated by the present Sir George Baden Powell, K.C.M.G., M.P. The

Presidency of this Committee was fitly entrusted to Sir Travers Twiss, D.C.L., Q.C., whose state of health, however, it is to be feared, may prevent his attendance at Liverpool. A careful *Questionnaire*, however, has been drawn up and circulated, and the Secretary of the Committee, Mr. Thomas Barclay, LL.B., of Paris, will probably be able to place some valuable replies before his colleagues at Liverpool. Other subjects of importance, such as International Copyright, Arbitration, &c., will also be before the meeting, and we are sure that if reading maketh a full man, the members of the Liverpool Conference ought to rise up full men from the feast of reason provided for them by the Association.

Reviews.

The Exchequer Rolls of Scotland. Edited by GEORGE BURNETT, LL.D., Lyon King of Arms. Vol. XII., 1502-1507. Edinburgh: H.M. General Register House. 1889.

It is impossible to speak of the volume now before us without giving some expression, however brief and inadequate, to our feeling of the great loss which students of History have sustained in the late Lyon King of Arms. His work in editing the Scottish Exchequer Rolls, under the direction of the Lord Clerk Register, was a long and laborious task, and in many respects it could not but be also a dry, and, it might seem, unremunerative task. But the power which the late Lyon shewed, during the twelve years devoted by him to this series, of grasping the thread of the always intricate combinations of parties, which are so conspicuous in Scottish Mediæval History, caused each successive Introduction to be looked forward to with interest, as volume after volume saw the light, and the tangled skein of Mediæval Politics was gradually being unravelled. To have done this would alone have established for the late Lyon a claim to a position in the front rank of modern Scottish historians. But

the editing of the *Exchequer Rolls* was only one of the various works which he contributed from time to time to the lightening of the labours of those who should come after him. A work on the Great Seals of Scotland, almost finished, and a History of his own family, prepared for the New Spalding Club, besides his *Red Book of Menteith Reviewed*, his *Popular Genealogist and Pedigree Making*, his articles in *The Genealogist* and other Periodicals, and his constant helpfulness to those who were pursuing any of his favourite lines of study—though all these things only represent a portion of his daily occupations, their mention may suffice to shew that the late Lyon lived a full life, as it was a useful one. *Aler flammam* may be said to have been his motto. He nourished the flame of Learning in all who came into contact with him and who were capable of being kindled at the blaze. We are glad to know that his successor in the Lyon Court is a kindred spirit, who has already done good work for the Scottish Record Series, and who will, we doubt not, hand on to coming generations the light which shone brightly in the hands of George Burnett.

. Pressure on our space obliges us to postpone Titles and Indices, as well as Articles and other matter in hand.—ED.

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Quarterly Digest
of
ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR AUGUST, SEPTEMBER AND OCTOBER, 1889.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

(i.) **Ch. D.**—*Charge of Debts—Married Woman—General Power of Appointment—Direction to Pay Debts.*—The testatrix, a married woman, by her will, dated in 1879, directed her executors to pay her debts, and, in exercise of a general power of appointment, appointed real and personal estate to the executors on certain trusts. She died in 1880. *Hold*, that debts incurred by her on the credit of her separate estate were charged on the corpus of the appointed property.—*De Burgh Lawson v. De Burgh Lawson*, L.R. 41 Ch.D. 568; 58 L.J. Ch. 561; 37 W.R. 797.

(ii.) **Ch. D.**—*Legacy to Wife—Abatement.*—Where a testator's estate is insufficient to pay all the legacies in full, a legacy to his wife to be paid immediately after his death, for her immediate requirements, is liable to abatement as well as the other legacies.—*Cazenore v. Cazenore*, 61 L.T. 115.

(iii.) **P. D.**—*Probate Act, 1857, s. 73—“Special Circumstances.”*—In a suit where the only question for decision was the legitimacy of the applicant, who claimed as sole next-of-kin to be entitled to a grant of letters of administration to an intestate, the person entitled as sole next-of-kin in the event of the illegitimacy of the applicant made a compromise with the latter, according to which the applicant was to take the grant. *Hold*, that these facts constituted “special circumstances,” and that the grant should be made.—*In the goods of Minshull*, 61 L.T. 257.

Appropriation of Payments:—

(iv.) **C. A.**—*Banking Account—Trust Monies.*—Decision of Ch. D. (see Vol. 14, p. 62, v.) reversed.—*Hancock v. Smith*, L.R. 41 Ch. D. 456.

QUARTERLY DIGEST.

Attachment :—

(i.) **Q. B. D.—Judgment Debtor—Protection.**—A judgment debtor, against whom a committal order has been made under section 5 of the Debtors Act, 1869, is not entitled to the protection given by section 14, subsection 1 (c) of the Sheriffs Act, 1887, such order not being an "attachment for debt."—*Mitchell v. Simpson*, L.R. 23 Q.B.D. 373; 58 L.J. Q.B. 423; 61 L.T. 248; 37 W.R. 798.

Bankruptcy :—

(ii.) **Q. B. D.—Action against Bankrupt—Injunction to Restraine Refused—Bankruptcy Act, 1883, ss. 9, 10, 37.**—B., who had acted as agent in Australia for a London firm, brought an action against the firm in Australia for wrongful dismissal. A bond with sureties was given as security for the damages in the action. A member of the firm died, and a receiving order was afterwards made against the firm. *Held*, that the action ought not to be restrained, as it was not clear that B.'s right against the estate of the deceased partner and the sureties to the bond would not be prejudiced, or that expense would be saved. *E. p. Chief Official Receiver; in re Spalding*, 61 L.T. 83.

(iii.) **Q. B. D.—Bankruptcy Notice—Not in Accordance with Judgment—Final Judgment—Amendment—Bankruptcy Act, 1883, s. 4.**—B. was plaintiff in a probate suit to which A. was a defendant. On September 11th an order was made on A. to pay £113, the costs of the suit, to C. the agent of B.'s solicitor. The costs were not paid, and B. issued a bankruptcy notice calling on A. to pay to B. "the sum of £113 claimed by him as being the amount due on a final judgment obtained by him against you in the Probate Division dated the 11th day of September." A receiving order was made against A. for non-compliance. *Held* (1) that the order of September 11th was not a final judgment; (2) that the notice was not according to the terms of the judgment; (3) that amendment could not be allowed, and that the receiving order must be set aside.—*E. p. Arkell; in re Arkell*, 61 L.T. 90.

(iv.) **Q. B. D.—Close of Liquidation—Power of Creditors to Grant Discharge—Bankruptcy (Discharge and Closure) Act, 1887.**—After the proceedings in a bankruptcy are closed, the creditors have no power to grant the debtor his discharge.—*E. p. Hart; in re Hart*, 58 L.J. Q.B. 440; 61 L.T. 256.

(v.) **Q. B. D.—Provable Debt—Damages for Misrepresentation in Prospectus of Company—Bankruptcy Act, 1883, s. 37.**—S. commenced an action against G., a director of a company, for damages for issuing a fraudulent prospectus, whereby S. was induced to take debentures in the company. G. became a bankrupt, and subsequently S. obtained judgment against him in the action. *Held*, that the amount of damages was not a provable debt.—*E. p. Stone; in re Gites*, 61 L.T. 82; 37 W.R. 767.

(vi.) **Q. B. D.—Trustee—Retaining Money—Interest—Committal—Bankruptcy Act, 1883, ss. 74, 102.**—The Board of Trade may charge interest at the rate of 20 per cent. on the sum in excess of £50 retained by a trustee for more than ten days from the date of his receipt of it down to the date of the certificate of audit, and not merely to the date of the removal of the trustee from office. The Court will make an immediate order for committal of the trustee for non-payment of the principal, directing the order to be kept in the office for such period as the Court shall think fit, but in the first instance will make an order for the payment only of the interest.—*Re Tatum; e. p. Same v. Harker*, 60 L.T. 896.

Bill of Exchange:—

(i.) **Q. B. D.**—*Fraud in Negotiation—Value “in Good Faith Given”*—*Onus of Proof—Bills of Exchange Act, 1882, s. 30, sub-s. 2.*—In an action on a bill of exchange, when fraud in negotiation has been proved, the holder must prove both that value has been given, and that it has been given in good faith without notice of the fraud.—*Tatam v. Haslar*, L.R. 23 Q.B.D. 345; 58 L.J. Q.B. 432.

Bill of Sale:—

(ii.) **Q. B. D.**—*Sale by Sheriff—Receipt and Inventory—Bills of Sale Act, 1878, s. 4.*—The sheriff having seized J.'s goods under a writ of execution, J. requested the defendants to purchase the goods and re-let them to his wife under a hiring agreement. The defendants accordingly purchased the goods at an amount sufficient to pay the execution debt, and received an inventory of the goods with a receipt. The defendants then let the goods to J.'s wife on a hiring agreement. J. became bankrupt, and his trustee claimed the goods. Held, that the transaction was one of purchase by the defendants, and that the receipt and inventory did not require registration.—*Jones v. Tower Furnishing Co.*, 61 L.T. 84.

(iii.) **Ch. D.**—*Deed of Gift—Bills of Sale Act, 1878—Bills of Sale Act, 1882—13 Eliz., c. 5.*—T. made a deed of gift of furniture to his wife. He afterwards assigned the furniture to the defendants by way of security. The defendants took possession. After the death of T. his widow sued to restrain the defendants from keeping possession. The deed of gift had never been registered. Held (1), that the Act of 1878 did not avoid the deed as against the defendants, who were neither trustees or assignees in bankruptcy, nor execution creditors; (2), that the Act of 1882 did not avoid it, as it was not a security for money; (3), that the statute of Elizabeth was no defence, as the defendants were not defending as creditors, but as persons entitled to possession of specific property, and that the point ought to have been raised by way of counter claim or separate action by the defendants on behalf of themselves and all other creditors.—*Tuck v. Southern Counties Deposit Bank*, 60 L.T. 885; 37 W.R. 769.

(iv.) **Q. B. D.**—*Schedule—Specified Chattels—Bills of Sale Act, 1882, ss. 4, 5, 6, 9.*—A bill of sale assigned by way of security, specified chattels, and “also all chattels and things which may at any time during the continuance of the said security be substituted for them, or any of them, pursuant to the covenant hereinafter contained.” There was no such covenant in the bill of sale. Held, that the bill of sale was void, not being in accordance with the form required by the Act.—*Hadden v. Oppenheim*, 60 L.T. 962.

Colonial Law:—

(v.) **P. C.**—*Natal—Land taken by Crown—Transfer—Law No. 19 of 1875—Lands Clauses Consolidation Act, 1872.*—Where the Crown has lawfully resumed possession of Crown lands alienated to a subject, the execution of a transfer is not necessary to complete the title of the Crown. Therefore in Natal, where land is so taken by the Crown, and no compensation is payable, the owner cannot be compelled to execute a transfer of the land.—*Colonial Secretary of Natal v. Behrens*, L.R. 14 App. Cas. 381; 61 L.T. 57.

(i) **P. C.**—*Reservation in Grant—Perpetuity.*—The Governor of New South Wales, in 1823, granted land to the appellant's predecessor in title, reserving to the Crown "any quantity of land, not exceeding ten acres, as may be required for public purposes." In 1882, the Governor, in pursuance of this reservation, took possession of ten acres of the land for a public park. *Held* (1) that the reservation took effect as a defeasance, and not as an exception, and was not void for uncertainty or repugnancy; (2) that, assuming the Crown to be affected in England by the rule against perpetuities, such rule was not applicable at the date of the grant to Crown grants of land in the colony, or to reservations or defeasances in such grants to take effect on a remote contingency if necessary for the public good.—*Copper v. Stuart*, L.R. 11 App. Cas. 286; 60 L.T. 875.

Company:—

(ii.) **Ch. D.**—*Agreement before Registration—Ratification.*—By an agreement made before the registration of a company, it was agreed that B. should be secretary for a term of years at a salary. The directors confirmed the agreement. In the winding-up B. claimed for arrears of salary, and for damages for the termination of his employment. *Held*, that the company could not ratify an agreement made before it came into existence, and that the claim for damages must be disallowed, but that B. was entitled to remuneration for work done.—*In re Dale & Plant, Limited*, 61 L.T. 206.

(iii.) **Q. B. D.**—*Bill Signed on Behalf of Company—Incorrect Title—Liability of Director—Companies Act, 1862, ss. 41, 42.*—A. was chairman, and B. and C. directors of the "South Shields Salt Water Baths Company, Limited," which had no power to accept bills. A bill was addressed to the "Salt Water Baths Company, Limited, South Shields." The bill was accepted by A. as chairman, and by B. and C. as directors of the "South Shields Salt Water Baths Company." *Held*, that A., B. and C. were personally liable on the bill, in consequence of the variations from the proper title of the Company.—*Atkin v. Wurdle*, 58 L.J. Q.B. 377; 61 L.T. 23.

(iv.) **Ch. D.**—*Contract to take Shares—Delay.*—W. applied for shares, which were allotted to him. The directors afterwards, by agreement with W., rescinded the resolution allotting the shares, and returned the deposit. W. was never treated as a shareholder for five years, after which the company was wound-up, and the liquidator sought to make W. a contributory. *Held*, that the liquidator was seeking to enforce W.'s contract to take shares, that he was in no better position than the company, and that the delay was fatal.—*Re West London Commercial Bank; Whitley's Case*, 60 L.T. 807.

(v.) **Ch. D.**—*Debentures—Power to Take Possession of all Assets—Winding-up—Receiver.*—Debentures issued by a company charged all the present and future assets, and provided that at any time after a winding-up petition had been presented, the debenture-holders might appoint a receiver, who should have power to take possession of all the assets. After a winding-up order had been made, the debenture-holders appointed a receiver, and applied for leave for him to take possession of all the assets. *Held*, that leave should not be given, but that the official liquidator should be appointed receiver on behalf of the debenture-holders, with liberty for them to attend proceeding till their claims were satisfied.—*In re Henry Pound, Son, & Hutchins*, 61 L.T. 207; 37 W.R. 726.

- (i.) **C. A.**—*Director—Gift to by Promoter—Fiduciary Position of Director.*—Whilst there are any questions open between a company and its promoter, a gift from the promoter to a director must be accounted for to the company, and the company has the option of claiming the thing given or its highest value whilst held by the director.—*Eden v. Ridsdale's Railway Lamp and Lighting Co.*, L.R. 23 Q.B.D. 368.
- (ii.) **C. A.**—*Interest in a Company to be formed—Member—Assets—Companies Act, 1862, s. 23.*—Decision of Ch. D. (see Vol. 14, p. 68, iv.) reversed.—*Zuccani v. Nacupai Gold Mining Co.*, 61 L.T. 176.
- (iii.) **Ch. D.**—*Payment of Dividends—Cash.*—A provision in articles of association for payment of dividends, means *prima facie* payment in cash, and a resolution to provide for payment of dividends by the issue of debentures is *prima facie ultra vires*.—*Wood v. Odessa Waterworks Co.*, 58 L.J. Ch. 628; 37 W.R. 733.
- (iv.) **Ch. D.**—*Reduction of Capital—Different Classes of Shares—Companies Act, 1867, ss. 9-11, 13-19.*—A company cannot reduce the value of some of its shares without reducing that of the whole.—*In re Union Plate Glass Co.*, 37 W.R. 792.
- (v.) **Ch. D.**—*Transfer or Sale of Business—Dissenting Shareholder—Companies Act, 1862, s. 161.*—A shareholder in a company, which had transferred its business to a new company, had notice of resolutions which gave her an option of taking shares in the new company, such option to be exercised within a fixed time. She also had notice of an agreement and deed poll which fixed no date for exercising the option. She protested against the arrangement, and did not exercise the option. After the time for exercising the option had passed, the shares in the new company having risen in value, she demanded shares, and, on being refused, brought an action for an allotment or damages. Held, that the plaintiff was bound by the resolutions; that the agreement and deed poll were part of the arrangement, and that the plaintiff should have applied within the limit of time fixed by the resolutions. Held, also, that the plaintiff having laid by, her action was inequitable.—*Weston v. The New Guston Co.*, 60 L.T. 805.
- (vi.) **Ch. D.**—*Undertaking for Public Purpose—Winding-up—Jurisdiction.*—A waterworks company incorporated by Act of Parliament may be wound-up by the Court, and will be so wound-up in a proper case, although it may be necessary to obtain an Act of Parliament to enable the property to be sold.—*In re Barton-upon-Humber Water Co.*, 58 L.J. Ch. 613.
- (vii.) **C. A.**—*Voluntary Winding-up—Transfer of Business—Sanction of Court—Companies Act, 1862, ss. 138, 161.*—The sanction of the Court which is required to make a resolution for the transfer of a company's business to another company valid, in case a winding-up order is made within a year, can only be obtained at or after the making of such order, and cannot be obtained in the matter of a voluntary winding-up.—*In re Callao Bis Company*, L.R. 42 Ch. D. 169.
- (viii.) **Ch. D.**—*Winding-Up—Sale to New Company—Dissentient Shareholder—Valuation of Interest—Commission—Companies Act, 1862, ss. 161, 162—R.S.C., 1883, O. xxxvii., r. 5.*—The liquidator of a company agreed to sell its business to a new company. A dissentient shareholder required the liquidator to abstain from selling, or to purchase his interest at a price to be fixed by arbitration. Pending the arbitration, the liquidator took out a summons for a commission to take evidence in India as to the value of assets of the company situate there. Held, that the Court had jurisdiction, that the arbitration was a compulsory

one to which the Court would give its assistance, and that the value which had been put on the shares of the company in the agreement for sale to the new company did not fix the price to be paid to a dissentient shareholder for his interest.—*In re Mysore West Gold Mining Co.*, 37 W.R. 794.

Conspiracy :—

(i.) **C. A.**—*Trade Combination*.—Decision of Q. B. D. (see Vol. 14, p. 7, v.) affirmed.—*Majul Steamship Co. v. McGregor*, 58 L.J. Q.B. 465; 37 W.R. 756.

Contempt of Court :—

(ii.) **C. A.**—*Newspaper Comments*—*Discretion*.—If, pending the trial of an action, matter referring to it is published in a newspaper without any intention to prejudice the trial, although a technical contempt of court is committed, the Court will not commit the publisher unless the publication is likely to, or actually does, prejudice either of the parties, or interferes with the course of justice.—*Hunt v. Clarke*, 58 L.J. Q.B. 190; 37 W.R. 724.

Contract :—

(iii.) **C. A.**—*Name of Party to Agreement*—*Statute of Frauds*, s. 4—*Signature*.—Decision of Ch. D. (see Vol. 14, p. 106, iii.) affirmed.—*Stokell v. Nicen*, 61 L.T. 18.

Copyholds :—

(iv.) **Ch. D.**—*Tenancy in Tail*—*Enfranchisement*—*Barring the Entail*.—A tenant in tail of land in a manor in which there was a custom to entail, devised it to trustees on trust for his daughter and only child, A. The trustees were admitted tenants on the trusts of the will, and enfranchised the land. They then, by a deed which recited that the consideration for the enfranchisement had been paid by A. and her husband, conveyed the land to A., her heirs and assigns. *Held*, that the effect of the enfranchisement was to bar A.'s estate tail, and that she was entitled in fee.—*E. p. School Board for London*, L.R. 41 Ch. D. 517; 60 L.T. 817.

Costs :—

(v.) **C. A.**—*Originating Summons*—R.S.C., 1883, O. iv., r. 3.—Where trustees take out an originating summons to obtain the direction of the Court, the Court may make an order as to costs, although all the beneficiaries are not before the Court. If the judge makes no order as to costs he must be taken to have reserved them.—*Eland v. Medlund*, L.R. 41 Ch. 476; 58 L.J. Ch. 572; 60 L.T. 851; 37 W.R. 733.

(vi.) **Ch. D.**—*Patent*—*Particulars of Objections*—“*Reasonable and Proper*”—*Certificate*.—The defendant to an action for infringement delivered particulars of objections. At the trial the plaintiff's case broke down, and the action was dismissed without hearing the defendant's case. The judge refused to certify that the particulars were reasonable and proper, on the ground that he had not looked at them. The Court of Appeal took the same view. *Held*, that the defendant could not have his costs of the particulars.—*Longbottom v. Shaw*, 37 W.R. 792.

(vii.) **C. A.**—*Depriving Successful Party*—R.S.C., 1883, O. ix., r. 1.—Letters written “without prejudice” are not admissible to shew that there is “good cause” for depriving the successful party of his costs.—*Walker v. Wilsher*, L.R. 28 Q.B.D. 385; 58 L.J. Q.B. 501; 37 W.R. 723.

See Trade Name, p. 23, ii.

County Court :—

(i.) **C. A.—Prohibition—Appeal from Divisional Court—Action Struck out by County Court Judge—New Trial.**—An appeal from the Divisional Court on a question of a prohibition to a County Court judge may be made without leave. A County Court Judge has jurisdiction to order a new trial of an action, although he has previously struck it out for want of jurisdiction.—*Lister v. Wood*, L.R. 23 Q.B.D. 229; 37 W.R. 738.

Damages :—

(ii.) **Ch. D.—Detention of Goods—Measure of Damages.**—The plaintiffs sued claiming certain cargoes of guano, and the defendants denied their title. An order was made by consent for the appointment of a receiver, and the defendants were allowed to take possession of the cargoes without prejudice, undertaking to keep accounts. The plaintiffs, by amendment, claimed damages for detention of the cargoes. At the trial the plaintiffs were declared entitled. Held, that the plaintiffs' right to damages for detention was not affected by the fact that the cargoes had been placed *in medio*, that the measure of damages was the loss suffered by them by being kept out of possession, and that such loss was properly measured by 5 per cent. on the value down to the date of judgment.—*Dreyfus Brothers v. Peruvian Guano Co.*, L.R. 42 Ch. D. 66; 61 L.T. 180.

Design :—

(iii.) **Ch. D.—Registration—New or Original—Patents, &c., Act, 1883, ss. 47, 58, 90.**—Where a design has been registered in one of the classes of goods specified in the schedule to the Designs Rules, 1883, although the proprietor's copyright in the design extends only to articles which come under that class, yet a similar design cannot be registered by another person in another of the classes, as it is not a new or original design.—*In re Read & Creswell's Design*, 58 I.J. Ch. 621.

Easement :—

(iv.) **Ch. D.—Light—Implied Obligation.**—A railway company granted a house to the plaintiff, with all the rights, easements and appurtenances. The railway was close to the house, and was carried on arches, through two of which light came to the house. The company afterwards conveyed surplus land on either side of the line and gave a long lease of the arches to the defendant, who blocked up the arches and thereby diminished the plaintiff's light. Held, that there was an implied obligation by the defendant not to interfere with the plaintiff's light, which was not restricted by any reasonable presumption on the plaintiff's part that the arches would be blocked up, and that the plaintiff was entitled to a mandatory injunction.—*Myers v. Catterson*, 61 L.T. 236.

Ecclesiastical Law :—

(v.) **H. L.—Benefice—Resignation—Validity—Acceptance.**—Decision of C. A. (see Vol. 12, p. 99, i.) affirmed.—*Reichel v. Bishop of Oxford*, L.R. 14 App. Cas. 259; 61 L.T. 131.

(vi.) **Q. B. D.—Public Worship Regulation Act, 1874, ss. 8, 9—Representation—Discretion of Bishop.**—The discretion of a bishop to refuse to entertain a representation from inhabitants is not absolute, but must be founded and exercised upon reasons sufficiently relevant to the particular circumstances of the case set out in the representation, and the bishop must consider the whole of the circumstances affecting such representation, without considering any other circumstances, or taking into consideration any other reasons than the circumstances of the case. Therefore, where a bishop gave as his reason for refusing to entertain

such a representation, that the main question at issue had been already decided in a previous case, and that further litigation on the subject would be mischievous, *held*, that he had not complied with the Act.—*Reg. v. Bishop of London*, 58 I.J. Q.B. 385.

(i.) **Court of the Archbishop of Canterbury.** — *Citation of Bishop—Jurisdiction.* — The archbishop sitting alone or with assessors has jurisdiction to try a bishop of his province on a charge of illegal practices in the conduct of divine service.—*Read v. Bishop of Lincoln*, L.R. 14 P.D. 88.

(ii.) **Court of the Archbishop of Canterbury.** — *Rubrics—Bishop—Minister—Acts of Uniformity.* The word "minister" in the rubrics relating to the administration of the Holy Communion includes a bishop, and a bishop officiating as minister in the service of the Holy Communion must conform to the order and form prescribed in the Book of Common Prayer.—*Read v. Bishop of Lincoln*, L.R. 14 P.D. 148.

Estoppel. — See Will, p. 25, iii.

Executor:—

(iii.) **Ch. D.** — *Liability—Distribution of Assets—Advertisement—Notice.* — Action by a legatee for payment of her legacy which was directed to be raised out of the real and personal estate of the testator, and the non-raising of which the plaintiff alleged was a breach of trust. J. was the only surviving executor. The executors of F., another executor, were made defendants, but claimed to be dismissed on the ground that they had distributed F.'s estate after advertising for claims against it. *Held*, that they ought not to be kept in Court in order that the plaintiff might obtain an account of F.'s estate which she could use against the beneficiaries in whose hands she could follow F.'s assets, but that the beneficiaries must be brought before the Court if the plaintiff desired to follow the assets in their hands. *Held*, also, that the fact that J. had acted as the solicitor to F.'s executors did not give them constructive notice of J.'s alleged breach of trust in not raising the legacy.—*Frewen v. Frewen*, 60 L.T. 953.

(iv.) **Ch. D.** — *Specific Legacy of Stock—Duty of Executor.* — Testatrix, having a general power of appointment over a sum of consols comprised in a settlement, bequeathed to A. £600 of the consols. The trustees of the settlement, after her death, sold the consols, and paid the proceeds into a bank to the credit of the two executors of the will. The executors drew a crossed cheque payable to the order of A. for £600. One of the executors forged A.'s endorsement, and drew out the £600. A. had not consented to receive his legacy in cash. *Held*, that, as the legacy was a specified legacy of consols, the executors ought to have reconverted the cash into consols, and that the remaining executor was liable for the amount of the legacy.—*Cutler v. Boyd*, 60 L.T. 859.

Habeas Corpus:—

(v.) **C. A.** — *Return—Excuse for Non-Compliance—Appeal.* — An appeal lies to the Court of Appeal against an order for attachment for disobedience to a writ of habeas corpus. To a writ of habeas corpus issued at the instance of the parent of a child, which had been wrongfully detained by the defendant, a return was made by the defendant to the effect that, before the issue of the writ, he had parted with the custody of the child to a third person, who had sent her out of the jurisdiction, and that it was therefore impossible for him to obey the writ. *Held*, that

it was no excuse for non-compliance with the writ, that the defendant had wrongfully handed the child over to a third person, and that an attachment must issue. — *Reg. v. Barnardo*, L.R. 23 Q.B.D. 305; 37 W.R. 789.

Hawker:—

(i.) **Q. B. D.**—*Licence—Hawkers Act, 1888, s. 3—Exemption—Local Act.*—Where a local Act provided a penalty for persons hawking marketable articles without a corporation licence, *held*, that a person hawking fish without such a licence is liable to the penalty, and is not exempted by the Hawkers Act, 1888, which only exempts from Excise licences. — *Openshaw v. Oakley*, 60 L.T. 929.

Husband and Wife:—

(ii.) **C. A.**—*Liability of Husband for Ante-Nuptial Debt of Wife—Judgment Against Wife—Bar—Limitations—Married Women's Property Act, 1882, ss. 13-15.*—The plaintiff recovered judgment against the wife for an ante-nuptial debt, but such judgment remained unsatisfied because she had no separate estate. The plaintiff afterwards brought an action for the debt against the husband, who had acquired property from his wife to an amount exceeding the debt. *Held*, that the judgment against the wife was no bar. *Held*, also, that a husband cannot be made liable for an ante-nuptial debt of the wife which accrued *duo* against the wife more than six years before action brought. — *Beck v. Pierce*, L.R. 23 Q.B.D. 816.

Infant:—

(iii.) **Q. B. D.**—*Contract—Ratification—Building Society—Allotment to Infant—Infants Relief Act, 1874.*—An infant's contract in respect of a subject of a permanent character is not void, but voidable, and, if he desires to repudiate it, he must do so within a reasonable time of coming of age. An infant purchased land from a building society of which he was a member and a committee-man. He paid monthly instalments of the purchase-money, and acted as a committee-man for four years after he came of age. *Held*, that he had ratified the contract, and was bound by it. — *Whittingham v. Murdy*, 60 L.T. 956.

Insurance:—

(iv.) **Q. B. D.**—*Accident—Poison taken by Accident.*—An accidental death policy provided that the policy should only apply where the injury causing death was "caused by some outward and visible means." It also provided that the insurance should not extend "to death by suicide, whether felonious or otherwise," or "by poison or intentional self-injury." The insured, by accident, took poison in mistake for his medicine, and died from the effects. *Held*, that the accident was within the proviso, and that the representatives of the assured were not entitled to recover. — *Cole v. The Accident Insurance Co.*, 61 L.T. 227.

(v.) **Q. B. D.**—*Fire—Slip of Policy—Effect of.*—A slip containing particulars of the risk initialled by an underwriter is a complete and binding contract of insurance, and is not subject to an implied condition that a policy is to be put forward for signature within a reasonable time, and, in the absence of circumstances shewing an intention on the part of the assured to abandon the insurance, he is entitled to recover on the slip. — *Thompson v. Adams*, L.R. 23 Q.B.D. 361.

Lands Clauses Act:—

(i.) **H. L.**—*Land Taken for Sewage Farm—Depreciation of Remainder of Estate—Compensation—Lands Clauses Act, 1845, ss. 49, 63.*—Part of a building estate was taken for the purpose of making a sewage farm. The sheriff's jury awarded compensation in respect of the damage which would arise to the rest of the estate from the taking and anticipated use of the part taken. *Held*, that the award was lawful. *Held*, also, that the rest of the estate was "held with" the part taken, although divided from it by a line of railway.—*Cowper-Essex v. Acton Local Board*, L.R., 1st App. Cas. 153; 61 L.T. 1.

(ii.) **Ch. D.**—*Purchase-money of Land—Costs of Dealing with.*—Where the purchase-money of land subject to a settlement, which has been compulsorily taken, is paid into Court, the costs of dealing with the property according to the trusts of the settlement, after such payment in, not occasioned by anything in the nature of adverse litigation, are payable by the company.—*In re Brooshoff's Settlement*, 58 L.J. Ch. 654; 37 W.R. 744.

Legitimacy Declaration:—

(iii.) **P. D.**—*Gretna Green Marriage—Validity.*—A marriage at Gretna Green declared to be valid, and a declaration of legitimacy granted to the issue of the marriage, the facts being proved by the evidence of the wife, the husband and the witnesses having died, and a Scotch advocate having certified that what took place as described by the wife constituted a valid marriage according to Scotch law.—*Gardner v. A.-G.*, 60 L.T. 839.

Libel.—See Medical Practitioner, p. 12, iv.

Limitations.—See Husband and Wife, p. 9, ii.

Local Government:—

(iv.) **Q. B. D.**—*New Building—Power of Local Authority to Disapprove—Discretion.*—A local act required that plans of intended new buildings should be deposited with the corporation for approval. Plans of an intended new house were so deposited, which did not disclose any breach of any statutory provisions or of the corporation's bye-laws, but which were disapproved of by the corporation on the ground that the building was not suitable to the locality. *Held*, that there was no discretionary power of approval or disapproval, and that the corporation was bound to approve of the plans.—*Reg. v. Mayor, &c., of Newcastle*, 60 L.T. 903.

(v.) **Q. B. D.**—*Penalties Recovered Against Officer—Expenses Paid by Corporation—Personal Liability of Members of Corporation.*—Proceedings were instituted for penalties against the surveyor of a municipal corporation for being interested in contracts of the corporation. The corporation contributed towards the legal expenses of the surveyor. The penalties were recovered, and the order of the corporation which gave the surveyor his interest in the contracts and that for contributing towards his expenses were brought up by writ of *certiorari* to be quashed. *Held*, that those members of the corporation who voted for carrying on the legal proceedings were personally liable for the costs occasioned thereby.—*Reg. v. Whitley*, 61 L.T. 253.

(vi.) **C. A.**—*Public Health Act, 1875, s. 264—Notice of Action—Damages in Lieu of Injunction—Chancery Amendment Act, 1858, s. 2.*—An action was brought against a sanitary authority for an injunction against allowing sewage to discharge into a stream. The Judge thought that

it was not a case for an injunction, but awarded damages. *Held*, that he had power to give damages although there had been no notice of action. — *Chapman v. Auckland Guardians*, L.R. 23 Q.B.D. 294; 58 L.J. Q.B. 504. *

Lunatic.—See *Practices*, p. 15, iii.

Malicious Prosecution :—

(i.) **C. A.**—*Search Warrant*—*Judicial Act*.—Decision of Q. B. D. (see Vol. 14, p. 113, vi) affirmed.—*Let v. Charrington*, L.R. 23 Q.B.D. 272; 37 W.R. 736.

Marriage Settlement :—

(ii.) **Ch. D.**—*Construction*—*Resulting Trust*.—By a marriage settlement property of the wife was settled on trust after her death to pay the income to the husband “so long as he shall remain unmarried, and from and after the death of the survivor” the capital to be held on trust as therein mentioned. There was a covenant to settle after-acquired property of the wife. The husband survived and married again. *Held*, that there was a resulting trust for the wife of the interest undisposed of, that the covenant to settle after-acquired property did not affect it, and that the husband, as the wife's legal personal representative, was entitled to the undisposed of income.—*Gowan v. Wyatt*, 60 L.T. 920.

Married Woman :—

(iii.) **Ch. D.**—*Breach of Contract*—*Tort*—*Damages*—*Married Women's Property Act*, 1882, s. 1, sub-s. 2.—The defendant, a married woman, agreed to grant a lease to V. V. assigned the agreement by way of mortgage to the plaintiff. The defendant, in 1878, with notice of the mortgage, granted the lease to V. *Held*, that this was not a tort, but a breach of implied contract, which was not such an engagement as would have bound her separate estate before the Act of 1882. *Held*, also, that sec. 1, sub-sec. 2, of the Act of 1882 is not retrospective.—*Davies v. Stanford*, 61 L.T. 234.

(iv.) **Q. B. D.**—*Debt Contracted after Marriage*—*Judgment Against Separate Estate*—*Settlement after Judgment*—*Validity against Creditors*—*Married Women's Property Act*, 1882, s. 1, sub-s. 3, s. 19.—Judgment was obtained against the separate estate of a married woman, in respect of a debt contracted after marriage. After the judgment the married woman, being an infant, settled her property on trust for herself for life, for her sole and separate use, with a restraint on anticipation, and the settlement was approved by the Chancery Division. *Held*, that the settlement was good against creditors, and that the judgment creditors were not entitled to have a receiver appointed.—*Hemingway v. Braithwaite*, 61 L.T. 224.

(v.) **Ch. D.**—*Restraint on Anticipation*—*Covenant to Settle while Sole*.—E. appointed, in pursuance of a will, that after her death certain property should be on trust to be paid or transferred to M., with a proviso that it should be for her sole and separate use, and that her receipts should from time to time, after the same became due, and not by way of anticipation, be a sufficient discharge. M., by ante-nuptial settlement in 1882, covenanted to settle the property. E. died in 1889. *Held*, that the appointment created a restraint on anticipation, but that M.'s covenant, made by her when sole, had removed it, and that the property might be transferred to the trustees of M.'s marriage settlement.—*Wood v. Hooper*, 61 L.T. 197.

See Administration, p. 1, i.

Market:—

(i.) **Ch. D.—Weighing Machine—Duty to Provide—Markets and Fairs Act, 1887, s. 4.**—A market authority is bound to provide a proper weighing machine for the market, which must be a permanent structure, and not a movable machine.—*McIntosh v. Romford Local Board*, 61 L.T. 185.

Master and Servant:—

(ii.) **C. A.—Cab Proprietor and Driver—Hackney Carriage Act (6 & 7 Vict., c. 86)**—Whatever may be the bargain between a cab proprietor and a cab driver, the driver is, as regards the public, to be considered as the servant of the proprietor, and the latter is therefore liable for injuries caused by the negligence of the former. *King v. La do Imp. & Cab Co.*, L.R. 23 Q.B.D. 281; 58 L.J. Q.B. 456; 61 L.T. 34; 37 W.R. 737.

(iii.) **H. L.—Mines—Wages—Weight—Deductions—Illegality—Coal Mines Regulation Act, 1872, s. 17.**—Decision of C. A. (see Vol. 13, p. 79, i.) affirmed.—*Netherseal Colliery Co. Bourne*, L.R. 14 App. Cas. 228; 61 L.T. 125.

Medical Practitioner:—

(iv.) **C. A.—General Council of Medical Education—Removal of Name from Register—Power to Review Decision—Libel—Privilege—Medical Act, c. 29.**—Where the General Council of Medical Education has, acting *bond fide*, and after due enquiry, adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, and has ordered his name to be erased from the register, the Court has no jurisdiction to review their decision. The publication of the minutes of the council, containing a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of such infamous conduct, is privileged, if the report be accurate, and published *bond fide* and without malice, and the medical practitioner cannot maintain an action for libel against the council in respect thereof.—*Allbutt v. General Council of Medical Education*, L.R. 23 Q.B.D. 400; 37 W.R. 771.

Mines:—

(v.) **H. L.—Mines under Canal—Right to Work—Compensation.**—By a private Act authorising the making of a canal, now vested in the respondent company, it was provided that the right of owners of land to work minerals under the canal should not be affected, and that it should be lawful for them to work such minerals “not thereby injuring, prejudicing, or obstructing the canal;” and there were provisions for compensating the mineral owners for leaving such minerals unworked. The appellants, mineral owners, gave notice to the respondent company of their intention to work minerals under the canal. The respondent company declined to purchase the minerals or to pay compensation for leaving them unworked. The appellants then worked the minerals and damaged the canal. *Held*, that though the appellants might have initiated proceedings under the Act, and obtained compensation for leaving the minerals unworked, they were not entitled to work them to the injury of the canal, and were liable for the damage so caused.—*Knowles v. L. & Y.R.*, L.R. 14 App. Cas. 248; 61 L.T. 91.

Mortgage:—

(vi.) **Ch. D.—Action on Covenant—Stoppage of Interest—Tender—R.S.C., 1883 O. xxii., rr. 1, 3—Costs**—The plaintiffs sued the defendants on their covenant in a mortgage deed to recover £12,000 and interest. The defendants

offered to pay on having the securities returned to them. The plaintiffs having made a further advance to an assignee of the equity of redemption claimed to be entitled to tack. The defendants took out a summons for stay of proceedings on payment of the £12,000 and interest on terms of the securities being returned. No order was made, but on a special case it was held that the plaintiffs were entitled to £12,000 and interest on terms of reconveying the property to the defendants subject to any equity of redemption subsisting in any other persons. The defendants claimed that interest should cease at the date of the summons. Held, that as there was no actual tender or payment into Court, the defendants must show a continual readiness to pay, which they had not done. Held, also, that the plaintiffs' denial of the right to redeem not having been purely frivolous or vexatious, they must be allowed the general costs of the action, but disallowed such costs as were caused by their putting forward a case which failed.—*Kinnaird v. Trollope*, 58 L.T. Ch. 556; 60 L.T. 892.

- (i.) **Q. B. D.**—*Assignment of Debt—Charge—Judicature Act, 1873, s. 25, sub-s. 6.*—A mortgage of debts due to the mortgagor, made with a proviso for redemption and reconveyance on repayment to the mortgagee, is “an absolute assignment (not purporting to be by way of charge only).”—*Tancred v. Delagoa Bay Railway Co.*, L.R. 23 Q.B.D. 239; 58 L.J. Q.B. 459; 61 L.T. 229.
- (ii.) **Ch. D.**—*Consolidation—Surety.*—In 1875 G. mortgaged real estate to I. In the same year G. mortgaged shares to I., and by the same deed A. mortgaged shares to I. A. was in fact a surety for G., but the suretyship did not appear on the deed, and was not known to I. A.'s shares were realised in part payment of the mortgage debt. Held, that I. was entitled to consolidate his mortgages against G., and that as I. was ignorant of A.'s suretyship, A. was in no better position than G.—*Re Tongeod's Legacy Trusts*, 61 L.T. 19.
- (iii.) **Ch. D.**—*Exercise of Power of Sale.*—A mortgagee is not a trustee of his power of sale, and his motives for exercising it will not be examined by the Court. He cannot, however, offer the property to a purchaser for an amount which will cover his debt, without regard to the value of the property. The Court will, whether the sale is by private contract or by auction, consider whether the mortgagee has acted with reasonable care and prudence.—*Colson v. Williams*, 58 L.J. Ch. 539; 61 L.T. 71.
- (iv.) **C. A.**—*Redemption—Tender—Notice.*—After default in payment of the mortgage money in accordance with the proviso for redemption in the mortgage deed, the mortgagor is entitled to redeem at any time on tender of the principal and six months' interest in lieu of notice.—*Johnson v. Evans*, 61 L.T. 18.

Municipal Election:—

- (v.) **Q. B. D.**—*Signature to Nomination Paper—Burgess Roll—Variation—Municipal Corporations Act, 1882, s. 241.*—A burgess's name was Henry Devereux Davenport. On the burgess roll he was entered as Davenport, Henry D. Evereux. He signed a nomination paper by his proper name. Held, that the nomination paper was good.—*Harding v. Cornwall*, 60 L.T. 959.

Negligence:—

- (vi.) **H. L.**—*Dangerous Work—Volenti non Fit Injuria.*—A railway company agreed with X. that he should shunt their trucks, and supply horses and men, the company to provide boys to assist when they had them, and the

shunting to be done without boys when they had not. The plaintiff for several years shunted trucks as the servant of X, sometimes with, and sometimes without, a boy. The operation of shunting is dangerous to a man performing it without assistance. On one occasion the plaintiff asked for a boy, but, as none could be procured, did the shunting alone, and was injured. In an action against the company, held, that there was no negligence or breach of duty on the part of the company against the plaintiff; held, also, that the plaintiff had voluntarily done the work with full knowledge of the risk, and could not recover.—*Membray v. G.W.R., L.R. 14 App. Cas. 179.*

Notice.—See *Executor*, p. 8, iii.

Patent:—

(i.) **Ch. D.**—*Infringement—Profits—Mode of Taking Account.*—The defendants were ordered to give an account of profits made by using the plaintiff's patented invention for improved machinery for operating on forgings. Held, that the accounts must shew what was the cost of the defendant's forgings both previously to and during the user of the plaintiff's invention.—*Siddell v. Vickers*, 61 L.T. 233.

Poor Law:—

(ii.) **Q. B. D.**—*Rating—Vacant Land—Occupation*—43 *Eliz.*, c. 2, s. 1.—A. purchased a plot of land for building purposes. It was never inclosed, cultivated, let or used by him. A notice that the land was "to let" was fixed on it. The cattle of a neighbour strayed into the land and fed there, without A.'s knowledge or permission. Held, that A. was not the constructive occupier, and could not be rated.—*Smith v. New Forest Union*, 60 L.T. 927.

(iii.) **Q. B. D.**—*Rating—Assessment—General District Rate—Public Health Act, 1875, ss. 207, 211.*—By 28 *Geo. III.*, c. 64, and 34 *Geo. III.*, c. 104, the Cambridge Improvement Commissioners were empowered to levy a rate on all houses, &c., in Cambridge. At that time the colleges of the University were not assessable to the said rate. Held, that such rate was not a "rate in the nature of a general district rate leviable throughout the whole of the district" within the meaning of sec. 7 of the Public Health Act, 1875; and that as regards so much of the rate leviable on the railway company as was necessarily applicable to the purposes of the public Health Act, the company was assessable on one-fourth only of the net annual value of their property.—*G.E.R. v. Cambridge Improvement Commissioners*, 61 L.T. 243.

(iv.) **Q. B. D.**—*Rating—Sewage Farm—Loss in Working—Pumping Station.*—A corporation acquired land which they used as a sewage farm for the disposal of their sewage. There was a pumping station attached to the farm. The farm was worked at a loss. Held, that as the corporation was bound to dispose of the sewage, but had a choice of the means of doing so, and as they incurred loss instead of profit by the occupation of the farm, their occupation was neither beneficial nor profitable, and they were not rateable in respect of it. Held, also, that they were rateable in respect of the pumping station, which, if severed from the farm, might be let to a hypothetical tenant.—*Burton-on-Trent Corporation v. Byginston Churchwardens; Same v. Stretton Churchwardens*, 63 L.J. M.C. 187.

Prerogative:—

(v.) **Ch. D.**—*Removal of Buildings—R.S.C. 1893, C. xxviii, c. 1.*—In an action against two defendants for wrongful removal of buildings the

defendants pleaded, one that he had nothing to do with the removal, the other that he had only acted as a servant, and had no notice of the plaintiff's claim. The plaintiff had previously recovered judgment against other persons for the same wrongful acts, and the defendants had notice of the former judgment at the time of pleading. At the hearing, after the plaintiff's evidence had been given, the defendants asked leave to amend by pleading merger of the cause of action in the previous judgment. There was some evidence of acts of the defendants subsequent to such judgment which gave the plaintiff a fresh cause of action. Held, that the amendment ought not to be allowed, as it was not possible by any order as to costs to put the plaintiff in the same position as if the defendants had pleaded properly at first.—*Edevoine v. Cohen*, L.R. 4 Ch. D. 568; 61 L.T. 168.

- (i.) **Q. B. D.—Appeal in Bankruptcy—Notice Sent by Post—Time**—A notice of appeal in bankruptcy sent by post, which does not reach the respondent in the ordinary course of post till after the expiration of the time for appealing, is out of time, although it was posted before the expiration of such time.—*E. p. Cochrane; in re Faulconer*, 61 L.T. 56.
- (ii.) **Ch. D.—Appeal—Time—Orders in Chambers—Motion to Discharge—Final or Interlocutory—R S C, 1883, O. lvi, r. 15.**—The rules respecting the time for appealing to the Court of Appeal do not apply to motions to discharge orders made in chambers, and no longer time should be given for moving to discharge a final order than one which is not final. Application may be made to enlarge the time in either case. An order on second further consideration of an administration action, directing the payment of debts and costs, and the carrying over of certain funds, and giving liberty to apply, is not final.—*Manchester and Liverpool Banking Co. v. Beales, Johnson v. Hooley*, 61 L.T. 160; 37 W.R. 765.
- (iii.) **Q. B. D.—Charging Order—Lunatic—Form of Order—1 & 2 Vict., c. 110, s. 4—3 & 4 Vict., c. 82, s. 1**—A charging order obtained by a judgment creditor on funds standing to the credit of the defendant, a lunatic, in the name of the Paymaster-General, must state the amount of the fund charged, and must not charge so much of the lunatic's interest in the funds, "as the Lords Justices sitting in Lunacy may deem applicable to the payment of the said judgment debt."—*Horne v. Pountain*, L.R. 23 Q.B.D. 264; 58 L.J. Q.B. 418.
- (iv.) **P. C.—Cross Actions & Contradictory Verdicts.**—Where cross-actions involving the same questions of law and fact are tried separately, and contradictory verdicts are given, the evidence being so equally balanced that a jury might fairly have decided either way, the proper course is to order the actions to be tried again together. If, however, one verdict is against the weight of evidence, while the other is warranted by the evidence, the latter may be allowed to stand, and the former may be set aside.—*Australian Steam Navigation Co. v. Smith*, L.R. 14 App. Cas. 321; 61 L.T. 185.
- (v.) **C. A.—Defence Struck Out—Application for Judgment—Defendant out of Jurisdiction.**—In an action against M., a British subject resident in Trinidad, and other defendants, resident in England, the plaintiffs claimed to be beneficially entitled, according to the law of Trinidad, to certain real estate in Trinidad vested in M. M. in his defence denied that the law of Trinidad was as alleged by the plaintiffs. His defence was afterwards struck out for want of discovery, and the plaintiffs contended that M. was in the same position as if he had admitted the allegations in the statement of claim. Held, that as the defence

had only been struck out for a collateral reason, the law of Trinidad had not been sufficiently proved to justify a decision; and that the action must stand over generally, with liberty to apply, with a view to proceedings being taken against M. in Trinidad.—*Jenney v. Mackintosh*, 61 L.T. 108.

- (i.) **Ch. D.—Default of Appearance—Judgment—Motion to Set Aside—Costs.**—A guarantee fund for the execution of a contract made between F. and the Government of the Cape Colony, was deposited with the plaintiffs in the name of M., the Agent-General of the Colonial Government. The plaintiffs advanced money to F. on the security of the fund. At the request of M. they paid part of the sum to his credit at a colonial bank, being advised that they were bound to make the payment, and that M. was bound to pay it to them. M. refused to pay it to the plaintiffs who sued him to recover it. M. did not appear, and judgment was given against him by default. M. moved to set aside the judgment on the ground that the money had been paid to the Colonial Government, and that the action had been brought against him as the nominee of the Government, who could not be sued. Held, that M. ought to have an opportunity of presenting his case, and that the judgment ought to be set aside on terms of M. paying the costs occasioned by his default, and the costs of the present application.—*Wright v. Mills*, 60 L.T. 887.
- (ii.) **C. A.—Discontinuance—Costs—Proceedings—R.S.C., 1883, O. xxvi., r. 1.**—Accepting money paid into Court, and paying money into Court in answer to a counter-claim are not proceedings in an action taken by a plaintiff who gives notice of discontinuance so as to render it ineffectual to give the defendant his costs.—*Spencer v. Watts*, L.R. 23 Q.B.D. 350; 58 L.J. Q.B. 383.
- (iii.) **C. A.—Discovery—Privileged Documents—Interrogatories.**—The plaintiff claiming under the will of X., sued for the recovery of land which was in the defendant's possession. The defendant, in his affidavit of documents, claimed privilege for a bundle of documents on the ground that they related solely to his title, and in no way tended to the support of the plaintiff's title. The plaintiff administered interrogatories asking whether such bundle contained the will of X., or any copy of or extract from the same. Held, that the interrogatories were inadmissible.—*Morris v. Edwards*, L.R. 23 Q.B.D. 287; 61 L.T. 149; 37 W.R. 721.
- (iv.) **Q. B. D.—Discovery—Privileged Communications.**—A successful plaintiff in an action for an infringement of his trade-mark advertised the proceedings. The draft advertisement was settled by counsel. A defendant in the action alleged the advertisement to be libellous, brought an action for its publication, and sought to obtain discovery of the draft submitted to counsel. Held, that it was privileged.—*Lowden v. Blakey*, L.R. 23 Q.B.D. 382; 61 L.T. 251.
- (v.) **Q. B. D.—Discovery—Libel—Action against Newspaper—Interrogatory as to Name of Writer.**—In an action against a newspaper proprietor for libel, if the defendant admits the publication of the words complained of, the plaintiff may not interrogate him as to the name of the writer of the alleged libel, unless the identity of such writer is material to some issue raised in the case.—*Gibson v. Evans*, L.R. 23 Q.B.D. 384.
- (vi.) **Q. B. D.—Dismissal for Want of Prosecution—Revenue Proceedings—R.S.C., 1883, O. lxviii., r. 2—Costs.**—The rules as to dismissal of an action for want of prosecution do not apply to proceedings on the revenue side. Therefore, where an information had been filed in respect of foreshore rights, and after proceedings had been continued

for some time, the defendant was informed that the Attorney-General did not propose to proceed further, held, that the Court could not dismiss the information for want of prosecution, and that as there was no discontinuance, the information had not determined, and the Crown could not be ordered to pay the defendant's costs — *A. G. v. Williamson*, 60 L.T. 980.

- (i) **C. A.**—*Evidence—Right to Cross Examine own Witness.*—Where a party to an action has called a witness, he is not entitled as of right to cross examine him, even though he is a hostile litigant. The presiding Judge has a discretion as to allowing such cross examination — *Price v. Manning*, 58 L.J. Ch. 649, 37 W.R. 785.
- (ii) **Ch. D.**—*Married Woman—Examination.*—A married woman interested in a settled estate which is leased or sold under the Settled Estates Act, 1877, who has been served with a notice under section 26 of the Act, and submits her rights to the Court, need not be separately examined — *Re Stanley's Settled Estates*, 61 L.T. 169.
- (iii) **Q. B. D.**—*Receiver—Foreign Company—Foreign Liquidator.*—The defendants a French company, suffered judgment by default and a receiver was on the 4th of April appointed of the property the subject of the action in which the defendants had an interest and which was then in this country. On the 8th of April the defendants were declared by the French Court to be in liquidation and a liquidator was appointed. By French law the appointment of a liquidator dates back ten days earlier than the date of his appointment. Held that the appointment of the French liquidator did not over ride the appointment of the receiver of property situate in England — *Mason v. Barry v. Société des Métaux*, 37 W.R. 735.
- (iv) **P. C.**—*Rule nisi—Amendment of—Discretion.*—Both parties to an action treated a question at issue as one which ought to be decided by the Judge and not the jury. A rule nisi for a new trial was afterwards obtained on the ground that the Judge had decided the question wrongly. On the rule coming to be heard application was made for leave to amend the rule by stating that the question ought to have been left to the jury. The Court in its discretion refused the application. Held, that the discretion was rightly exercised — *Australasian Steam Navigation Co v. Smith*, L.R. 14 App. Cas. 318, 61 L.T. 184.
- (v) **Ch. D.**—*Service of Writ—Foreign Corporation—Appointment of Agent to Accept Service—R.S.C., 1883, O. ix, r. 8.*—In a contract between an English company and a foreign corporation which had no place of business in England, it was provided that the contract was to be construed according to English law, that the corporation should submit to the jurisdiction of the English Courts, and that R should be the agent of the corporation in England, on whom any legal process arising out of the contract might be served, and that such service should be deemed good service on the corporation, and that the appointment of R should not be revoked except by the appointment of another agent. The corporation became bankrupt, and failed to carry out the contract, and an action was commenced against it, the writ being served on R. No other agent had been appointed. Held, that the parties could contract themselves out of the rules and agree to a particular mode of service, that the bankruptcy of the corporation did not revoke the appointment of R, and that the service was therefore good — *Tharau Sulphur and Copper Co. v. Société Industrielle des Métaux*, 58 L.J. Q.B. 485, 60 L.T. 924.

(i.) **Ch. D.**—*Stay of Proceedings Pending Appeal—Time of Application for.*—An application for a stay of proceedings pending an appeal ought to be made at the time the judgment is given, when the Court has all the facts before it; if made some time afterwards it will be refused unless special grounds for the suspension are shewn.—*Tuck v. Southern Counties Deposit Bank*, 61 L.T. 159; 37 W.R. 769.

(ii.) **C. A.**—*Third Party—Judgment for Defendant—Appeal—Service on Third Party*—R.S.C., 1883, O. lviii., r. 2.—The defendant claimed to be indemnified by a third party, on whom he served a third party notice. The action was dismissed, and the plaintiff appealed without serving the third party with notice of the appeal. Held, that it was not the plaintiff's duty to serve the third party with notice, but that the defendant ought before the hearing of the appeal to have applied for leave to serve him.—*Priest v. Uppleby*, 61 L.T. 146.

(iii.) **Q. B. D.**—*Third Party Notice—Service out of Jurisdiction*—R.S.C., 1883, O. xi., r. 1 (e); O. xvi., r. 48.—Where, in an action for a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction, the defendant claims to be entitled to an indemnity from a third party, the Court may allow service out of the jurisdiction of notice of such claim, unless the third party is domiciled or ordinarily resident in Scotland or Ireland.—*Dubout & Co. v. Macpherson*, L.R. 23 Q.B.D. 340; 58 L.J. Q.B. 496.
See Habeas Corpus, p. 8, v.

Privy Council:—

(iv.) **P. C.**—*Admission to Practice as Agent.*—Under the rules of 1870, only solicitors or others practising in London, or solicitors admitted by the High Court in India or the corresponding Courts in the Colonies, can be admitted to practice as agents in the Privy Council. The Judicial Committee have no discretionary power to extend the class of those eligible.—*In re Twidale's Petition*, L.R. 14 App. Cas. 328.

Railway:—

(v.) **Ch. D.**—*Scheme of Arrangement—Railway Companies Act, 1867, ss. 7, 9, 15—Judgment Creditor.*—Where a scheme of arrangement has been filed a judgment creditor will not be allowed any exceptional position on the making of an order for stay of proceedings, on the ground that he had served notice of motion for equitable execution before the filing of the scheme.—*Devas v. E. & W. India Dock Co.*, 58 L.J. Ch. 522; 61 L.T. 217.

In the Railway Commission Court:—

(vi.) *Division of Rates—Booking—Quoting a Rate—Person Interested—Railway and Canal Traffic Regulation Act, 1878, s. 14—Railway and Canal Traffic Regulation Act, 1888, s. 38.*—Where a railway company regularly accepts traffic on definite terms for conveyance to a foreign station, they are to be held to "book" to such foreign station, although they may call such acceptance of traffic "quoting a rate;" and the Commission has power to order the division by the booking company of through rates so "quoted" where such company have the necessary information. Any person who makes out that the rates which he seeks to have divided are substantially competitive rates with his own is a "person interested," and is entitled to have the rates divided. Such person must, however, make out his interest by proper and legal evidence. The applicants asked for a division of the rates quoted by the respondent company at ten specified stations, and at the stations nearest respectively to the places at which traffic is received from nine

specified collieries to fifteen specified stations. Except by inference from an allegation that the nine collieries competed with the applicants, it was not stated that the coal of seven of such nine collieries was sent to any of the fifteen stations. It was not alleged that coal was sent by the respondent company from any of the ten stations, nor that they were stations of the respondent company, nor that any of the nine collieries sent coal from such stations. It was not stated which of the fifteen stations belonged to the respondent company. Held, that the applicants had not shown that they were "persons interested," or that the respondent company had the information necessary for the division of the rates, and that the application must be dismissed.—*Pelsall Coal Co. v. L. & N.W.R.*, 61 L.T. 257.

Rent Charge:—

(i.) **C. H. D.**—*Recovery—Uncertainty as to Land Charged—Copyhold Act, 1887.*—By awards of enfranchisement made at the instance of the lord of the manor, of copyholds of which the defendant was tenant, three rent charges were created, which became vested in S. The rent charges fell into arrear, and S. demised the lands subject thereto for 500 years on trust by mortgage or sale to raise the rent charges. To an action to recover arrears, and to have the lands charged ascertained, or to have lands of equal value set out, the defendant pleaded that the lands charged were intermixed with freeholds of his own, and that the boundaries had been confused before the enfranchisement without any fault or neglect of his. Held, that there must be an order for payment of all the rent charges. The land charged with one of the rent charges being ascertained by evidence, held, that there must be a declaration as to what it consisted of. Held, that if on enquiry it could not be ascertained what were the lands charged with the other rent charges, lands of equal extent must be set out to secure them.—*Searle v. Cooke*, 61 L.T. 189; 37 W.R. 730.

Revenue:—

(ii.) **C. A.**—*Income Tax—Loan for less than a Year—Interest—Deduction of Tax.*—Decision of Q. B. D. (see Vol. 14, p. 90, v.) reversed.—*Goslings v. Blake*, L.R. 23 Q.B.D. 824; 58 L.J. Q.B. 446; 37 W.R. 774.

(iii.) **H. L.**—*Income Tax—Mutual Insurance Company—Profits—Bonuses.*—A mutual insurance company had no shareholders. The premiums were sufficient to leave a surplus after providing for expenditure, which was returned to the assured as bonuses, or applied in reduction of premiums, or carried over to the credit of the members of the company, the policy-holders. Held, that such surplus was not assessable to income tax.—*New York Life Insurance Co. v. Styles*, 61 L.T. 201.

Riparian Owner:—

(iv.) **C. H. D.**—*Right to Preserve Course of River.*—The accustomed course of a river which a riparian owner is entitled to have preserved is the natural and apparently permanent course at the time when the right is asserted or called in question. Where, by gradual accretion of sediment, the bed of a river and the flow of water have become permanently altered, a riparian owner may not, by removing the accretion, restore the flow of water to its former state as to velocity and direction.—*Widger v. Purchase*, 60 L.T. 819.

Sale of Coals :—

(i.) **Q. B. D.—Method of Weighing—Action for Penalty.**—In an action by a purchaser of coals to recover penalties from the seller under sec. 57 of 1 & 2 Will. IV., c. lxxvi., it must be shown that the sacks were weighed in the particular manner prescribed in sec. 54.—*Smith v. Wood*, L.R. 23 Q.B.D. 380; 61 L.T. 252; 37 W.R. 800.

School Board :—

(ii.) **Q. B. D.—Election—Returning Officer's Charges—Regulations as to Elections, 1886, r. 20—Reference to Education Department—Power to Re-open Taxation.**—Where the bill of charges of a returning officer at a school board election has been referred to the Education Department, and an award has been made, the Department has power, with the consent of both parties, to re-open the enquiry and make a different award.—*Parsons v. Lakenheath School Board*, 58 L.J. Q.B. 371.

Scotch Law :—

(iii.) **H. L.—Improvement Charges—Recovery of—Scottish Drainage and Improvement Company's Act, 1856, ss. 52-61.**—A company was incorporated by a private Act for the purpose of advancing money for the improvement of land, the expenses to be charged on the fee of the lands, and to be recovered in the same manner as "any feu duties, or rent, or annual rent, or other payment out of the same lands, would be recoverable in Scotland." Held, that the company could not sue the landowner personally for an annual charge on his land under the Act.—*Scottish Drainage & Improvement Co. v. Campbell*, L.R. 14 App. Cas. 139.

(iv.) **H. L.—Succession—Nearest-of-Kin—Post-Nuptial Contract—Movable Succession Act, 1855.**—By post-nuptial contract the husband and wife conveyed their whole property (then consisting of movables) each to the other in the event of his or her surviving, in life rent, and to their children in fee. There was provision for testamentary disposition to take effect at the expiration of the life rent "in the event of there being no children alive at the death of the predecessor, or dying in the life time of the survivor" of the spouses. Failing such disposition, the whole estate "belonging, or which may belong, to the said husband shall fall to and become the property of his own nearest of kin." The husband purchased heritable estate in 1848, and died in 1858, without any testamentary provision, survived by his widow and one child. The child died in 1863 of full age, leaving one son born in 1862. The widow, in 1877, sold the heritable estate, conveying it with the consent and concurrence of the infant grandchild. The grandchild died an infant in 1881, bequeathing to his grandmother any right he had in the purchase money. Held, that the term "nearest-of-kin" described the person who filled that character at the death of the husband, namely, the son; and that the will of the grandson passed the purchase money, the sale of the heritage not having been challenged by him within the prescribed period. "Nearest-of-kin," since the Act of 1855, does not mean legal heirs *in mobiliis*.—*Hood v. Murray*, L.R. 14 App. Cas. 124.

Ship :—

(v.) **P. D.—Bill of Lading—Named Consignee—Wrongful Delivery.**—Where, by the terms of a bill of lading, the goods are to be delivered to a named consignee or his assigns, the master may not deliver them to such consignee without the production of one of the parts of the bill of lading. The plaintiff shipped goods under such a bill of lading on a German vessel belonging to the defendant, to be delivered at a German

port. The German law was proved not to differ essentially from the English law. *Held*, that the defendant was liable for wrongful delivery, the master having delivered to the consignee without production of either part of the bill of lading.—*The Stettin*, L.R. 14 P.D. 142; 61 L.T. 200.

- (i.) **H. L.**—*Charter Party—Guarantee as to Ship's Capacity—Marginal Note—Representation.*—A charter party provided that a ship should load such goods as should be tendered, the freight to be a lump sum. The vessel was guaranteed to take not less than 2,000 tons, and there was a provision for a reduction in the freight if she should not carry the guaranteed weight. The cargo was to be machinery and coal, and there was a marginal note on the charter party describing the "largest pieces" of machinery by number, weight, and measurement. The charterers tendered a cargo not in excess of 2,000 tons. The largest pieces of machinery were in excess of the number stated in the marginal note, owing to which the whole cargo could not be shipped unless the coal was packed with the machinery, which was not done, and the ship accordingly sailed with less than 2,000 tons of cargo. *Held*, that the marginal note was a representation, and that the cargo was not such as was contemplated, and that the charterers were not entitled to any reduction of freight. *Held*, also, that it would not be proper stowage to pack the coal with the machinery without the consent of the shippers of the cargo, and that the charterers, and not the shipowners, ought to have obtained such consent.—*Muckill v. Wright*, L.R. 14 App. Cas. 106.
- (ii.) **P. D.**—*Collision — Fog — Anchorage Ground — Thames Rules*, 1872, Arts. 10 §. 12.—Although a vessel may be justified in anchoring in the fairway of the Thames through being overtaken in a dense fog, such a place is not a proper anchorage ground, and she ought to be moved as soon as possible, and if a collision occurs while she is so anchored, the question will be whether the weather was such that she could move after having anchored. A steamship bound up the Thames on the flood tide ought not to leave the wharf and get under way in a dense fog; and, *seme*, if a vessel is overtaken by a dense fog while going up on the tide, she ought to go dredging up stern first with her anchor down, so that she may be brought up at any moment.—*The Aguadillana*, 60 L.T. 897.
- (iii.) **C. A.**—*Insurance—Improper Navigation—Improper Stowage.*—Decision of Q. B. D. (see Vol. 14, p. 127, viii.) affirmed.—*Canada Shipping Co v. British Shipowners' Association*, L.R. 23 Q.B.D. 342; 58 L.J. Q.B. 462; 60 L.T. 863.
- (iv.) **P. D.**—*Limitation of Liability—Incorrect Register—Evidence.*—In an action of limitation of liability the defendants may give evidence to show that the register tonnage of the plaintiff's vessel is incorrect.—*The Recepta*, L.R. 14 P.D. 131.
- (v.) **H. L.**—*Master's Disbursements — Maritime Lien — Admiralty Court Act, 1840, s. 6—Merchant Shipping Act, 1854, s. 191—Admiralty Court Act, 1861, s. 10.*—A ship's master has no maritime lien for his disbursements.—*Hamilton v. Baker; The Sara*, L.R. 14 App. Cas. 209; 58 L.J. P. 57; 61 L.T. 26.
- (vi.) **C. A.**—*Salvage or Towage Agreement—Supervening Circumstances—Award.*—Where the master of a ship has agreed to tow a vessel which is in distress to a named port for a fixed sum, the contract is binding, even though through an increase in the weather the performance of it becomes more difficult than was contemplated; but if supervening circumstances are such that the performance of the contract becomes nautical impossible, the Court of Admiralty may treat it as if it had

never been made, and, if the vessel is taken to a place of safety, may award salvage; and this is so whether the original agreement was a towage or a salvage agreement.—*The Westbourns*, L.R. 14 P.D. 182; 61 L.T. 156.

- (i.) **P. D.—Salvage—Consolidated Actions—Tender—Costs.**—Where separate salvage actions against the same ship were consolidated, leave being given to the plaintiffs to appear separately at the hearing, their interests being conflicting, and the defendants with their defence tendered a sum as sufficient to satisfy all claims, but did not apportion it, the Court having upheld the tender, ordered all parties to pay their own costs subsequent to the tender, the defendants paying the costs previous to the tender.—*The Lee*, 60 L.T. 939.
- (ii.) **C. A.—Wharfinger—Representation.**—Decision of P.D. (see Vol. 14, p. 92, v.) reversed.—*The Calliope*, L.R. 14 P.D. 188.

Solicitor :—

- (iii.) **C. A.—Action for Costs—Counter-claim for Negligence—Judgment.**—The plaintiffs sued for costs. The defendant counter-claimed for negligence, but did not appear at the trial. The plaintiffs proved their retainer, and that they had rendered the services. Held, on appeal, that the plaintiffs were entitled to judgment on the claim and counter-claim, so as to prevent the questions raised on them from being raised again in another action; that the counter-claim should be dismissed with costs, and that the plaintiffs ought to have the costs of the action, and to have judgment for the amount claimed, subject to taxation.—*Lumley v. Brooks*, 61 L.T. 172.
- (iv.) **Ch. D.—Property Preserved—Charge on—Bankrupt—Solicitors Act, 1860, s. 28.**—L., a bankrupt, intervened in a probate suit, and propounded a codicil, under which he was a legatee. L.'s trustee in bankruptcy then intervened, and propounded the codicil. The codicil was established. Held, that L.'s solicitor was not entitled to any charge for costs on L.'s interest under the codicil, until his creditors had been satisfied.—*Keeson v. Luxmoore*, 61 L.T. 199.

Tenant for Life :—

- (v.) **Ch. D.—Title Deeds—Custody of.**—An equitable tenant for life of settled estate, who was also one of the trustees of the settlement, was held entitled to the custody of the title-deeds upon his undertaking not to part with them without the consent of the trustees, and to produce them to the trustees on all reasonable occasions.—*Re Burnaby's Settled Estate*, 58 L.J. Ch. 664; 61 L.T. 22.

Trade Mark :—

- (vi.) **C. A.—Prior User—Patents &c., Act, 1883, s. 73.**—Decision of Ch. D. (see Vol. 14, p. 130, iv.) reversed.—*In re Dunn's Trade Marks*, L.R. 41 Ch. D. 439; 58 L.J. Ch. 604; 61 L.T. 98.
- (vii.) **Ch. D.—Registration—Fancy Word—Calculated to Deceive—Patents, &c., Act, 1888, s. 10.**—Section 10 of the Act of 1888 does not apply to marks, registration of which has been applied for before the beginning of 1889. The application to register "Oomoo" as a trade mark for wines, was opposed by the owner of a registered mark for wines, which consisted of the word "Emu," and a picture of the bird "Oomoo," in the language of Australian natives means "choice." Held, that "Oomoo" does not so nearly resemble "Emu" as to be calculated to deceive, and that it was a fancy word, being unintelligible to the average Englishman.—*Re Burgoyne's Trade Mark*, 61 L.T. 89.

(i.) **C. A.** — *Sheffield Registry — Old Corporate Mark — Jurisdiction — Patents, &c., Act, 1883, ss. 81, 90.* — Decision of Ch. D. (see Vol. 14, p. 54, iv.) affirmed. — *Re Lambert's Trade Mark*, 61 L.T. 138.

Trade Name:—

(ii.) **C. A.** — *Imitation — Defendant Using His Own Name.* — The plaintiffs had for many years carried on business under the name of Thomas Turton and Sons. The defendant, John Turton, had for many years carried on a similar business in the same town under the name, first of John Turton, and afterwards of John Turton & Co. He then took his sons into partnership, and traded as John Turton and Sons. There was no evidence of imitation of trade marks or attempts to deceive the public. Held, that although the public might occasionally be misled by the similarity of names, the defendants could not be restrained from using the name John Turton and Sons. The plaintiffs were ordered to pay costs on the higher scale. — *Turton v. Turton*, L.R. 42 Ch. D. 128.

Trustee:—

(iii.) **Ch. D.** — *Breach of Trust — Improper Payment of Costs.* — The trustees of a will paid various costs out of the income of the trust estate. In an action against them by a beneficiary it appeared that about half the amount of such costs was not chargeable against the estate, and that the remainder was properly payable out of corpus, and not out of income. Held, that the trustees must pay the costs of the action. — *Andrews v. Weall*, 61 L.T. 239; 37 W.R. 779.

(iv.) **Ch. D.** — *Default — Interest of Trustee — Assignment of Interest — Liability.* — Where a *cestui que* trust assigned a reversionary legacy to his trustee, and the trustee mortgaged it, and was subsequently declared a defaulter, the mortgagee was postponed to the claim of the beneficiaries to have the default made good. — *Doering v. Doering*, L.R. 42 Ch. D. 203; 58 L.J. Ch. 553; 37 W.R. 796.

(v.) **Ch. D.** — *Power of Appointment — Appointor Appointing Himself — Validity.* — The donee of a power of appointment of new trustees cannot appoint himself, although he is not beneficially interested in the trusts. Where a power was to A. to appoint "any other person" in the place of a trustee dying, &c., held, that the words of the power prevented A. from appointing himself. — *Skeats v. Evans*, 58 L.J. Ch. 656; *Skeats v. Allen*, 37 W.R. 778.

See Will. p. 25, v.

University Commissioners:—

(vi.) **Ch. D.** — *Power to Alter Qualification for Exhibitions — Universities of Oxford and Cambridge Act, 1877.* — Property was devised to the plaintiffs on trust that the income should be equally divided between ten of the servitors of Christ Church, such as the college should recommend, for sobriety, diligence at their studies, and of parts fit for a minister of the Gospel and designed for holy orders. The servitors were afterwards called exhibitors. The Commissioners made statutes for the college, one of which provided that the exhibitions of the testator's foundation should be applied to the support of college exhibitors, who should be elected, as the college authorities should determine, with no mention of any religious qualification. Held, that the exhibitions were "emoluments" within the meaning of the Act, that the statute was within the powers of the Commissioners, that it intended that there should be no religious qualification for exhibitors, and that the trust income was divisible

among exhibitors elected according to the statute, without reference to their being fit for a minister of the Gospel and designed for holy orders.—*Corporation of Sons of Clergy v. Christ Church, Oxford.*—58 L.J. Ch. 578; 61 L.T. 109.

Vendor and Purchaser:—

- (i.) **C. A.**—*Conditions—Misdescription—Compensation.*—The particulars described the property as containing 1,872 square yards. The conditions provided that if any error or misstatement in the particulars should be discovered, the same should not annul the sale, but that compensation should be allowed. It was discovered that the property contained only 1,033 square yards. *Held*, that on the construction of the conditions the vendors were entitled to specific performance on allowing compensation for the deficiency.—*In re Fawcett's Trustees & Holmes*, L.R. 42 Ch. D. 150; 61 L.T. 105.
- (ii.) **Ch. D.**—*Memorandum—Statute of Frauds—Counterpart—Misdescription of Vendor.*—Where the memorandum of a contract is signed in counterpart, and one copy is duly signed by the purchaser, the fact that the other copy is not properly signed is no bar to the vendor's suit for specific performance. The memorandum stated that V. was agent for the "vendor," who was described as "vendor" throughout the conditions. The particulars stated that the sale was by direction of the "owner." One of the conditions by mistake stated that the vendor was a trustee for sale. *Held*, that though the word "owner" was a sufficient description of the vendor, the subsequent mistake was fatal, and the vendor was not sufficiently designated.—*Butcher v. Nash*, 61 L.T. 72.
- (iii.) **Ch. D.**—*Title—Copyhold Treated as Freehold—Presumption of Enfranchisement—Limitations.*—Lands formerly copyhold had been dealt with as freehold for more than a hundred years. The last copyhold tenant died in 1819, and the lord had made no claim. In two deeds executed in 1878 and 1883 the land was stated to be copyhold. *Held*, on a vendor and purchaser summons, that enfranchisement might be presumed against the lord; that the two deeds to which the lord was not a party did not rebut the presumption; that the lord was barred by the Statutes of Limitations; and that the property was now freehold.—*In re Lidiard's Contract*, 37 W.R. 798.

Will:—

- (iv.) **Ch. D.**—*Charitable Gift—Validity—Statute of Charitable Uses (43 Eliz., c. 4)—"Aged."*—A testator gave a legacy to the treasurer of the L. Unitarian Chapel to found annuities for men and women, "not under fifty years of age, Unitarians, and who attend" the said chapel. He directed a tablet to be placed in the chapel "to give the information of gift, otherwise how should the deserving know of it?" *Held*, to be a valid charitable legacy.—*Pomeroy v. Willway*, 37 W.R. 779.
- (v.) **Ch. D.**—*Construction—Children and Issue of Deceased Children—Joint Tenancy or Tenancy in Common—"Issue."*—Bequest in trust for A. for life, and then "in trust for all and every my nephews and nieces who shall be living at the time of the death of" A. "and the issue of such of them as shall then be dead leaving issue as tenants in common, such issue nevertheless taking only the share or respective shares which the deceased parent or parents would have taken if living." *Held*, (1) that "issue" ought to be confined to "children," and (2), that the issue took as tenants in common *inter se*.—*In re Smith*, 58 L.J. Ch. 661.

(i.) **Ch. D.—Construction—Joint Tenancy or Tenants in Common.**—A testatrix devised her residuary estate on trust to apply part of the income for the maintenance of such of her children as might be under twenty-one till the youngest should attain that age, and as to the residue on trust for all or such of her children as should then be living, and the issue of such of them as should then be dead leaving issue in equal shares as tenants in common, “but the issue of any deceased child shall take only as a class as if by representation of their parent, and not as individuals.” *Held*, that the issue of a deceased child took as tenants in common, and not as joint tenants.—*Quirk v. Quirk*, 37 W.R. 796.

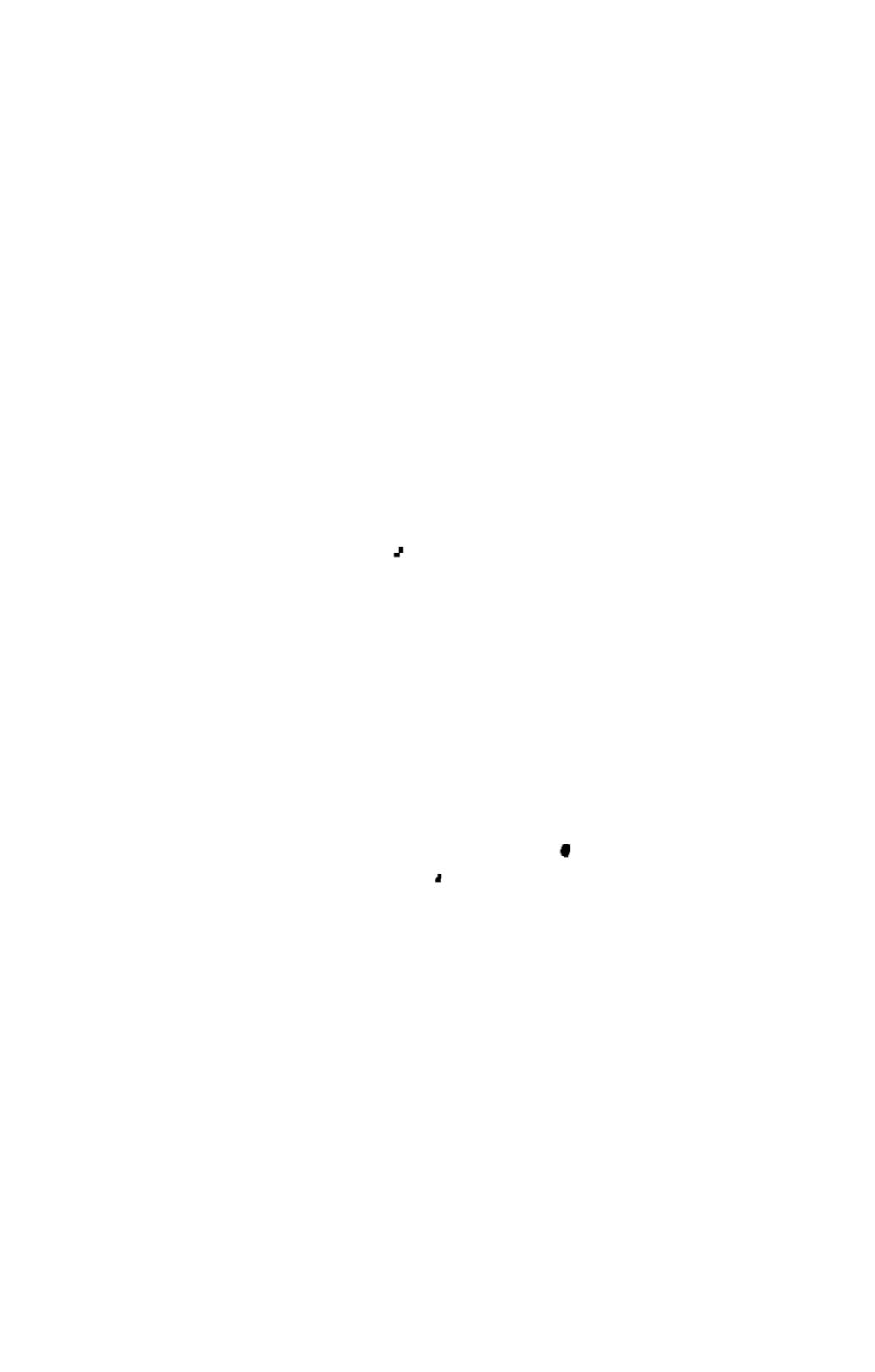
(ii.) **Ch. D.—Construction—Gift to Class of Children—When Ascertained.**—A testator gave his property to his widow for the benefit of his children so long as she remained unmarried, and in the event of her remarrying, gave her a life interest in a certain sum, and made certain other provisions, and continued, “At my wife’s death the estate then remaining is to be divided into four parts, and the proceeds divided equally among the children then surviving.” *Held*, that the residue vested in the children living at the widow’s second marriage.—*Helby v. Dear*, 58 L.J. Ch. 659.

(iii.) **Ch. D.—Devise of Freeholds and Copyholds—Construction—Estoppel.**—There was a devise of freeholds and copyholds to trustees on trust during the life of J. to receive the rents and pay them to J., or to permit him to receive them, and after the death of J. the same were devised to the heirs of J.’s body. A bill by J. against the trustees praying for a conveyance had been dismissed. *Held*, now, on a vendor and purchaser summons, that J. had an estate tail in the freeholds, and that the persons claiming under him were not estopped by the previous decision from so contending.—*In re Allsop & Joy’s Contract*, 61 L.T. 218.

(iv.) **Ch. D.—Execution of Power of Appointment—Wills Act, s. 27.**—Property was held in trust for such person as P. should by writing (not being a will or codicil), or by a will or codicil expressly referring to the power, appoint. P. bequeathed his personal estate generally, without referring to the power, or, specifically, to the property. *Held*, that P. had not a power to appoint “in any manner he might think proper,” and that his will was not an exercise of the power.—*Phillips v. Cayley*, 58 L.J. Ch. 569; 61 L.T. 195.

(v.) **Ch. D.—Gift for Maintenance of Animals—Validity.**—Testator gave to trustees certain animals, and charged his estate with the payment to the trustees of an annual sum for a term of years if any of the animals should so long live, to be applied in maintaining the animals, and directed that the trustees need not render any account of the annual sum, and that any part thereof remaining unapplied should be dealt with by them at their discretion. *Held*, that the gift was not charitable, and was valid, though there might be no person who could enforce it. *Held*, also, that the trustees could not retain any surplus of the annuity not required for the maintenance of the animals.—*Cooper-Dean v. Stevens*, L.R. 41 Ch.D. 552; 60 L.T. 818.

(vi.) **P. D.—Probate—Reference to Unexecuted Document.**—A testatrix bequeathed certain articles to such persons as she should direct by “any memorandum in writing, signed by me.” She drew up such a memorandum, but did not sign it. She afterwards made a codicil, confirming her will, except as altered by the codicil. *Held*, that the unsigned memorandum could not be admitted to probate.—*In the goods of MacGregor*, 60 L.T. 840.



Quarterly Digest

or

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR NOVEMBER, DECEMBER, 1889, AND JANUARY, 1890.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **P. D.—Administrator Absconding—New Grant.**—Where an administrator absconded and could not be found, and the only estate left unadministered was a claim against a bankrupt's estate, the Court without citation revoked the grant and made a new grant to one of the next-of-kin.—*In the goods of Covell*, L.R. 15 P.D. 8; 61 L.T. 620; 38 W.R. 79.
- (ii.) **P. D.—Grant Pendente Lite—Estate of Person whose Will is Undisputed—Probate Act, 1857, s. 70.**—P. was sole executrix of the will of R., and died leaving part of R.'s estate unadministered. P. left a will, which was disputed by W., who was one of the residuary legatees under R.'s will. Held, on the motion of W., that letters of administration with the will annexed ought to be granted in respect of the unadministered portion of R.'s estate, pending the action between W. and the executor named in the alleged will of P.—*In the goods of Fawcett*, L.R. 14 P.D. 152; 58 L.J.P. 87; 61 L.T. 308.
- (iii.) **P. D.—Grant to Committee of Lunatic—Amount of Bond.**—The committee of a lunatic having applied for a grant for her use and benefit, it appeared that the estate consisted of £12,000, of which all but £850 had been paid into the Chancery Division, and that the balance would shortly be paid in. Held, that it would be sufficient if the sureties entered into a bond for double the value of the estate after deducting the amount paid into court.—*In the goods of Morris*, L.R. 15 P.D. 9; 61 L.T. 652.
- (iv.) **C. A.—Letters—Stamp—Action for Amount not Covered by Stamp—Joint Tenancy—Investment in Joint Names—Limitations—Declaration of Trust.—Decision of Ch. D. (see Vol. 14, pp. 99, iii.; 110, iii.) affirmed.—Jacobs v. Hind**, 58 L.J. Ch. 708; 61 L.T. 581.

- (i.) **C. A.**—*Oath of Administrator—Motion to Modify.*—A. P. died intestate. Her husband, a sailor, had left her in 1860, and had not been heard of for more than twenty years. The attorney for A. P.'s brother applied for a grant of administration as next-of-kin, and moved for leave to swear that "he believed that the said A. P. was a widow at the time of her death." *Held*, that the administrator must either swear the oath in the usual form or cite the next-of-kin.—*In the goods of Pridham*, 61 L.T. 302.
- (ii.) **P. D.**—*Presumption of Death.*—The next-of-kin of a deceased intestate applied for a grant and asked leave for an affidavit to be made of the death of the deceased's husband, on the ground that his death might be presumed from the lapse of time since he had been heard of. *Held*, that such presumption could not be made, but that the grant would be made if the applicant was prepared to swear that the intestate died a widow.—*In the goods of Clark*, L.R. 15 P.D. 10; 61 L.T. 653.
- (iii.) **P. D.**—*Pauper Lunatic—Grant to Nominees of Guardians.*—The husband of a deceased intestate was a pauper lunatic confined in an asylum at the cost of the guardians of the poor. Notice having been given to his next-of-kin and no appearance entered, a grant was made to a nominee of the guardians for the use and benefit of the lunatic, limited to such time as he should remain insane.—*In the goods of Eccles*, L.R. 15 P.D. 1; 61 L.T. 652.
- (iv.) **C. A.**—*Advertisement for Creditors—Sufficiency—Lord St. Leonards' Act, s. 29.*—Decision of Ch. D. (see, Vol. 14, p. 99, iv.) affirmed. *Quere*, whether on such a point there is any right of appeal.—*Doughty v. Townson*, L.R. 43 Ch. D. 1; 59 L.J. Ch. 18; 61 L.T. 531.
- (v.) **Ch. D.**—*Annuity payable by Testator—Personal Estate Insufficient—Apportionment of Liability.*—A testator devised the residue of his real estates in trust for his son for life with remainders in strict settlement. He devised two estates upon similar trusts for his daughters respectively. He had, on his son's marriage, covenanted to pay an annuity during the joint lives of the son and his wife. After payment of debts his personal estate was insufficient to provide for the annuity. *Held*, that it must be apportioned between the three devised estates according to their values, and that each tenant for life, on paying his proportion of the annuity, would be entitled to a charge on the *corpus* in respect of each payment, but must keep down the interest on the amount so charged.—*Townson v. Harrison*, L.R. 43 Ch. D. 55.
- (vi.) **Ch. D.**—*Bequest of Annuities—Security for Annuitants.*—A testator bequeathed annuities charged on the whole of his property. The property consisted mainly of theatres, both freehold and leasehold. The annuitants claimed that the leasehold theatres should be sold and the proceeds invested to secure their annuities. *Held*, that the claim could not be enforced, the residuary legatees and devisees offering a sufficient security for the annuitants by way of a first mortgage on the freeholds, and a charge on the leaseholds subject to a mortgage to be effected to pay off existing incumbrances.—*Scott v. Leak*, L.R. 42 Ch. D. 570; 61 L.T. 380; 38 W.R. 226.
- (vii.) **Ch. D.**—*Order for Accounts—Executor—Trustee—Retainer—R.S.C., 1883, O. xv., r. 1; O. iv., r. 10(a).*—An order for accounts without administration made in an administration action, does not prevent a creditor of the estate from suing the executor, and the executor from paying a debt due from the estate. A husband in his marriage settlement, covenanted to pay the trustee a sum on trust for his wife for life, with an ultimate trust for himself. He died without paying the money, having appointed his wife sole executrix. An order for accounts was

made in an action by creditors against the executrix. The widow was afterwards appointed trustee of the settlement, and the estate proved insolvent. Held, that she was entitled to apply the assets in paying herself as trustee the sum due on the covenant.—*Whitaker v. Barratt*, L.R. 43 Ch. D. 70; 88 W.R. 59.

Arbitration:—

(i.) **Ch. D.**—*Award—Motion to Set Aside—Time—Enlargement*—9 & 10 Will III., c. 15, s. 2—R.S.C., 1883, O. lxiv., rr. 7, 14.—The Court may enlarge the time for moving to set aside an award, notwithstanding the expiration of the time limited by 9 & 10 Will. III., c. 15.—*In re Oliver and Colton and Scott's Arbitration*, 61 L.T. 552.

Banker:—

(ii.) **Q. B. D.**—*Compensation for Issue of Notes—Transfer of Business—Bank Charter Act, 1844, s. 23*.—A bank entitled under the Bank Charter Act, 1844, to compensation from the Bank of England for ceasing to issue its own notes, and issuing Bank of England notes only, is so entitled as a *persona designata*, and does not lose its right by transferring its place of business or amalgamating with other banks.—*Capital and Counties Bank v. Bank of England*, 61 L.T. 516.

Bankruptcy:—

(iii.) **Q. B. D.**—*Compromise of Claims—Approval by Committee of Inspection—Sanction of Creditors Refused—Bankruptcy Act, 1883, s. 89, sub-ss. 1, 2, 3*.—The trustee agreed to the compromise of claims against a bankrupt's estate. The committee of inspection, by a majority, sanctioned the compromise; but a meeting of the creditors refused to sanction it. Held, that as the creditors had acted *bond fide* and for their own interests the compromise must be abandoned.—*E. p. Hurlbatt; in re Ridgway*, 61 L.T. 647.

(iv.) **Q. B. D.**—*Costs of Solicitor Trustee—Bankruptcy Act, 1883, ss. 72, 73—Bankruptcy Rules, 1886, rr. 305, 306*.—When a solicitor is appointed trustee in a bankruptcy, his remuneration must be by a commission or percentage, and the creditors cannot pass a resolution directing that his remuneration shall be his proper professional charges for work done and expenses incurred in or about the bankruptcy proceedings.—*E. p. Board of Trade; in re Wayman*, L.R. 24 Q.B.D. 68; 59 L.J. Q.B. 28; 61 L.T. 644; 88 W.R. 95.

(v.) **Q. B. D.**—*Discharge—Conditional—Bankruptcy Act, 1883, s. 28*.—It is not wise to grant a discharge subject to a condition as to after acquired property unless the bankrupt is likely to succeed to considerable property, or unless he is earning an income more than sufficient to maintain himself and his family according to their station. Two offences under section 28 having been reported against a bankrupt, the County Court judge granted his discharge conditional on his consenting to judgment being entered against him for the amount of the unsecured debts and costs, such judgment to remain in force till the creditors had received 5s. in the pound. Held, on appeal by the bankrupt, that the proper order was to suspend the discharge for three years.—*E. p. Shackleton; in re Shackleton*, 61 L.T. 648.

(vi.) **C. A.**—*Discharge—Misdemeanour under Debtors Act, 1869—Bankruptcy (Discharge and Closure) Act, 1887, s. 2, sub-ss. 1, 3*.—The Court is not prevented from granting a bankrupt his discharge in consequence of a misdemeanour under the Debtors Act, 1869, committed by him after the adjudication of bankruptcy.—*E. p. Dunn; in re Brocklebank*, L.R. 23 Q.B.D. 461.

- (i.) **Q. B. D.—Discharge — Offences — Other Considerations — Bankruptcy Act, 1883, s. 28, sub-s. 3.**—The official receiver reported that the bankrupt had committed offences against sec. 28; and also that he had vexatiously taken a fictitious residence away from his place of business, and had there filed his petition when he knew that a creditor's petition had been filed; that he had traded with fictitious bills; and that he had asked his brother to put in a fictitious proof. *Held*, that these facts ought to be considered by the Court, and that the bankrupt ought not to have his absolute discharge.—*E. p. Cook*; *in re Cook*, 61 L.T. 385.
- (ii.) **Q. B. D.—Disclaimer of Onerous Property—Mortgage of Lease by Assignment.**—When a bankrupt has, previously to his bankruptcy, assigned by way of mortgage for the whole of the term, land demised to him by a lease containing onerous covenants, the interest of the bankrupt in the land is not property burdened with onerous covenants within the meaning of the Bankruptcy Act, 1883, s. 55, and no disclaimer by the trustee under that section is necessary.—*E. p. Official Receiver*; *in re Gee*, L.R. 24 Q.B.D. 65; 59 L.J. Q.B. 16; 61 L.T. 645; 38 W.R. 143.
- (iii.) **C. C. R.—Fraudulent Debtor—Offences against Debtors Act—Bankruptcy Act, 1883, s. 163 (1)—Debtors Act, 1869, s. 11 (9).**—A bankrupt can be convicted in respect of any of the offences mentioned in section 11, sub-section 9, of the Debtors Act, 1869, committed within four months before presentation of a bankruptcy petition by him.—*Reg. v. Beck*, 61 L.T. 596.
- (iv.) **C. A.—Jurisdiction — Domiciled Foreigner — Dwelling-House — Bankruptcy Act, 1883, s. 6, sub-s. (1) (d)—Single Creditor.**—A domiciled foreigner came over with his wife to conduct a litigation. He took five furnished rooms in a house, and engaged his own servants. The rooms were taken by the month, and were kept for three months. *Held*, that he "had a dwelling house," and was liable to bankruptcy proceedings. The fact that there is only one creditor, and no assets, is not a bar to proceedings. Such facts must be shewn on the examination of the debtor, not on the making of the receiving order, and are merely grounds for the exercise of the registrar's discretion.—*E. p. Baird*; *in re Hecquard*, L.R. 24 Q.B.D. 71; 38 W.R. 148.
- (v.) **C. A.—Appeal against Receiving Order—Notice to Official Receiver — R.S.C., 1883, O. lviii., rr. 2, 15; O. lxiv., r. 7—Bankruptcy Rules, 1886, r. 134.**—Where the ground of an appeal against a receiving order is that no receiving order ought to have been made, the official receiver need not be served with notice of the appeal, or be brought before the Court in any way.—*E. p. Harris*; *in re Harris*, 38 W.R. 195.
- (vi.) **Q. B. D.—Receiving Order—Application to Rescind—Service on Official Receiver—Bankruptcy Rules, 1886, r. 130.**—The official receiver is a necessary party to every application to rescind a receiving order. Where notice of appeal against a receiving order had been served on the official receiver, but not in the time prescribed by the rules, *held*, that the time for appealing ought not to be extended.—*E. p. Webber*; *in re Webber*, 61 L.T. 650; 38 W.R. 195.
- (vii.) **Q. B. D.—Second Mortgages—Right to Growing Crops.**—The debtor by a second mortgage, mortgaged his estate to A. After a receiving order was made against the debtor A. took possession of the estate. *Held*, that, as the possession of A. was lawful, he was entitled as against the official receiver to the proceeds of sale of growing crops which were cut during his possession.—*E. p. Official Receiver*; *in re Gordon*, 61 L.T. 299.

(i.) **C. A.**—*Petition Presented in Wrong Court—Judgment Debt—Appeal Pending—Discretion—Bankruptcy Act, 1883, ss. 95, 97, and s. 7 (4).*—The inadvertent presentation of a bankruptcy petition in the wrong court does not invalidate the jurisdiction, as the proceedings can be removed into the right court. A judgment debtor cannot claim as of right a stay of bankruptcy proceedings for the judgment debt pending an appeal against the judgment, such a stay being in the discretion of the registrar.—*E. p. French*; *in re French*, L.R. 24 Q.B.D. 63; 38 W.R. 52.

Bill of Sale:—

(ii.) **Q. B. D.**—*Affidavit—Residence of Grantor—Sufficiency of Description.*—A bill of sale described the grantor as being of three different places, all in the same county. The affidavit filed for registration described his residence as being one of those places. He lived at that place, and it was his principal place of business, the others being branch establishments. *Held*, that the description was sufficient.—*Greenham v. Child*, L.R. 24 Q.B.D. 29; 59 L.J. Q.B. 27; 61 L.T. 563; 38 W.R. 94.

(iii.) **Q. B. D.**—*Chose in Action—Erectory Interest under a Will—Bills of Sale Act, 1878, ss. 3, 4.*—A testator gave his wife the right of possession of all his pictures during her life, and subject thereto gave the pictures to T. After the testator's death T. mortgaged all his share and interest under the will of and in the sum of money, hereditaments, and premises devised and bequeathed thereby expectant on the decease of the widow. *Held*, that T.'s interest in the pictures was a chose in action, and that the mortgage did not, as regards them, require registration as a bill of sale.—*E. p. Singleton*; *in re Tritton*, 61 L.T. 301.

(iv.) **C. A.**—*Defeasance—Schedule—Description—After Acquired Property—Bills of Sale Act, 1878, s. 10, sub-s. 3—Bills of Sale Act, 1882, s. 4.*—By a bill of sale all the chattels "specifically described in the schedule" were assigned. The schedule described the chattels as "21 milch cows" on the grantor's farm, "and all goods, chattels, and effects in or upon the premises belonging to" the grantor. The grantor deposited a policy of insurance as collateral security. There was no memorandum of deposit, and the policy was not referred to in the bill of sale. After the execution of the bill of sale the grantor sold some of the cows and bought others. *Held* (1) that the policy of insurance was not a "condition or defeasance," and did not require registration; (2) that the bill of sale did not extend to any of the stock brought on the farm after its execution, as it contained no covenant affecting after-acquired property; (3) that the words "21 milch cows" were not a sufficient description of the chattels intended to be comprised.—*Carpenter v. Deen*, L.R. 28 Q.B.D. 566.

(v.) **Q. B. D.**—*Equity of Redemption—Interpleader.*—The grantee of an equity of redemption in chattels can maintain title to the chattels in an interpleader issue.—*Usher v. Martin*, 59 L.J. Q.B. 11.

(vi.) **Q. B. D.**—*Receipt for Purchase Money of Goods—Hiring Agreement.*—W., to provide funds for the dissolution of a partnership between his brother and Y., bought some machinery in Y.'s will for £650, receiving from Y. a receipt for the money. On the next day W. and Y. agreed in writing that Y. should hire the machinery at a half yearly rent of £50, and that when the payments of rent amounted to £1,000, the machinery should, on a further payment of £5, become Y.'s property. The machinery remained in Y.'s possession, plates with W.'s name being fixed to it. On Y.'s bankruptcy W. claimed the machinery. *Held*, that there was no document which required registration, and that W. was entitled.—*Collins v. Weymouth*, 59 L.J. Q.B. 18; 61 L.T. 642; 38 W.R. 175.

(i.) **C. A.**—*Registration—Deed of Gift—Bills of Sale Act, 1878, ss. 4, 8, 10—Bills of Sale Act, 1882, s. 5.*—In 1885, T. executed a deed of gift of furniture to his wife which was not registered as a bill of sale. In 1888 T. gave the defendants a bill of sale over the furniture as security for a loan, which bill of sale was registered. The defendants took possession of the furniture. *Held*, that the deed of gift ought to have been registered, but that as T. was not the “true owner” of the chattels at the date of the defendant’s bill of sale, such bill of sale was void except as against the grantor. *Held*, therefore, affirming the decision of the Ch. D. (see Vol. 15, p. 8, iii.), that the defendants could not hold possession of the furniture against T.’s wife.—*Tuck v. Southern Counties Deposit Bank*, L.R. 42 Ch. D. 471; 58 L.J. Ch. 699; 61 L.T. 348.

Building Society:—

(ii.) **Ch. D.**—*Arbitration—Appointment after Action Brought.*—The rules of a building society provided that any dispute between a member and the society should be referred to arbitration, and that five arbitrators should be elected at a general meeting, of whom three should be chosen by lot to decide any particular dispute. *Held*, that the rules contemplated a standing body of arbitrators, and that when no arbitrators had been elected previously to the commencement of an action against the society by a member, it was not competent for the society to elect arbitrators after action brought, and require the dispute to be submitted to them.—*Christie v. Northern Counties Permanent Benefit Building Society*, L.R. 43 Ch. D. 62.

(iii.) **Q. B. D.**—*Dispute with Member—Withdrawing Member—Arbitration—Alteration of Rules.*—The rules of a society provided that the rules might be added to, repealed, or altered. The plaintiff, a member, gave notice of withdrawal, more than a month after which the society was incorporated, alterations were made in the rules, and the alterations were registered. The altered rules provided for the reference to arbitration of all disputes between a member and the society. The plaintiff did not receive the amount due on his shares, and sued the society for it. *Held*, that the plaintiff remained a member, though he had given notice of withdrawal, and that the dispute must be referred.—*Davies v. Second Chatham Building Society; Mackenzie v. Eereton and West Derby Building Society*, 61 L.T. 680.

(iv.) **Ch. D.**—*Directors—Liability of—Investments.*—Directors of a building society may advance money on securities which a trustee could not accept. *Held*, that directors were not liable for the loss of money advanced on a second mortgage of a leasehold colliery and certain collateral security, although the valuer on whose opinion they acted was selected by the chairman from a list of four names supplied by the borrower. The directors afterwards advanced a large sum to pay off the first mortgagees, who threatened to foreclose, and entered into possession, and paid rents and royalties, and worked the colliery. *Held*, that they had implied power to do so, and were not liable for the loss of the moneys so advanced and expended in working.—*The Sheffield and South Yorkshire Building Society v. Aislewood*, 59 L.J. Ch. 34.

(v.) **Ch. D.**—*Mortgages—Ultra Vires—Subrogation—Building Societies Act, 1874, s. 15, sub-s. 2.*—The amount for the time being secured to a building society by mortgages from its members is not limited to the principal moneys thereby secured, but includes all sums due at the date of borrowing in respect of interest, fines, or otherwise, and all instalments not then accrued, but secured by the mortgages and outstanding. Where moneys were borrowed *ultra vires* by a building society and lent

to the members, who gave the society mortgages to secure the loans, held, that the lenders of the moneys to the society were entitled to follow their money into the hands of the borrowing members, and claim against the mortgages for the amount secured by them, notwithstanding that a premium was deducted by the society at the time of making the loans.—*Neath Permanent Benefit Building Society v. Lucas*, 59 L.J. Ch. 3; 61 L.T. 611 & 615; 38 W.R. 122.

(i.) **Ch. D.—Winding-up—Distribution of Assets—Advanced and Unadvanced Members.**—A building society was wound-up by order of the Court, and there was a surplus for distribution among the members. The rules made provision for a voluntary, but not for a compulsory winding-up. Held, that the assets must be divided, as nearly as possible, according to the interests existing at the commencement of the winding-up; that the unadvanced members were free from liability beyond what they were bound to contribute up to that date, but that they could not participate in the distribution before accounting for what was due from them at such date; and that the advanced members were not liable to be put on the list of contributors, but were entitled to redeem according to the rules, as if there had been no winding-up.—*In re Middlesborough, &c., Building Society*, 58 L.J. Ch. 771.

Charity :—

(ii.) **C. A.—Mortmain—Interest in Land—Bridge Tolls—Mortgage of.—** Decision of Ch. D. (see Vol. 14, p. 102, vi.) affirmed.—*Buckley v. Royal National Lifeboat Institution*, L.R. 43 Ch. D. 27; 38 W.R. 162.

(iii.) **Ch. D.—Mortmain—Mortgage of Corporation—Rates and Property.**—A mortgage by a municipal corporation on the rents and income arising from the undertaking for which the money was borrowed, and the general district rates, is not an interest in land under the Mortmain Act. A mortgage by such a corporation on the rates and borough, or district, fund, where the borough or district fund includes land from which a yearly income is derived, is an interest in land within the Mortmain Act. So is a mortgage by such a corporation, which by the Act under which it is made is charged on the land and property acquired for the purposes of the Act, where land and property have been so acquired.—*Bedford v. Teale*, 61 L.T. 671.

Colonial Law :—

(iv.) **P. C.—British Guiana—Roman-Dutch Law—Powers of Executors—Substitution.**—According to the Roman-Dutch law which prevails in British Guiana, the executors of a will are in reality procurators, and their powers with respect to the estate falling to the testators' heirs, are only those of management. A testator by will appointed B. and M. executors, jointly and severally, “and in case of the death, refusal, or inability to act of either of them,” he appointed F., “and in case of both dying, refusing, or being unable to act,” he appointed F. and C. with “powers of assumption, surrogation, and substitution to any of them to the two last surviving of them, and to any by them assumed, surrogated, and substituted.” B. and M. accepted office, but M. was sole acting executor, B. not residing in the colony. M. left the Colony, and purported to appoint X. in his place. Held, that the substitution was void, the powers of “assumption, surrogation and substitution,” being on the proper construction of the will, given to the “two last surviving” of the named executors.—*Farnum v. Administrator-General of British Guiana; Willems v. Same*, L.R. 14 App. Cas. 651; 59 L.J. P.C. 10; 61 L.T. 438.

(i.) **P. C.—Canada—Location Ticket—Timber-cutting License—Public Lands Act, 1869, s. 16.**—The plaintiffs had obtained from the Crown a location ticket of lands within a forest reserve, which, by the Forest Act, 1888, the Crown was prohibited from granting. *Held*, that the plaintiffs were in possession of land for valuable consideration given by them to the Crown, and had a right to be protected against the defendants, who held a timber-cutting licence from which the plaintiffs' lands were excepted.—*Gilmour v. Mauroi*; *Gilmour v. Allaire*, L.R. 14 App. Cas. 645; 61 L.T. 442.

(ii.) **P. C.—Lower Canada—Husband and Wife—Domicil—C.C., ss. 1,260, 6, 68.**—An *acte de mariage* in 1828, signed by husband and wife, recited that the husband was a day labourer in Quebec. *Held*, that this did not amount to a declaration by the husband that he was domiciled in Lower Canada, with the effect of a contract that the wife should be *commune en biens* with him. In section 68, C.C., domicil for the purpose of marriage is used in the sense of residence. Section 1,260, C.C., is subject to section 6. If no covenants are made, the consorts are presumed to have subjected themselves to the legal community of property; but movable property is governed by the law of the owner's international domicil.—*McMullen v. Wadsworth*, L.R. 14 App. Cas. 631; 59 L.J. P.C. 7; 61 L.T. 487.

(iii.) **P. C.—Lower Canada—Pledge—C.C., s. 1,975—Contract—Construction.**—Where the owner of a thing pledged for a specific debt tendered the debt and the creditor is unable to restore the pledge, the tender cannot be regarded as insufficient under sect. 1,975, C.C., which gives a right to detain for other debts of the owner. A document purported to be a unilateral contract, binding the signatories for an indefinite time to sell specified debentures of a company at a specified price to one of its officers; but the circumstances shewed that the real intention of the signatories was to limit for the common benefit their claims against the company, to facilitate a contemplated financial operation. *Held*, that the intention controlled the effect of the document, and that it could not be treated as an agreement for sale for the benefit of the officer mentioned in the contract.—*Senécal v. Pauzé*, L.R. 14 App. Cas. 637.

(iv.) **P. C.—Lower Canada—Riparian Rights—Navigable River.**—By the law of Lower Canada, the rights of riparian owners are the same whether the river is navigable or not. A railway company without parliamentary authority made an embankment on the foreshore, which cut off the respondent's land from a tidal and navigable river, leaving only one opening. *Held*, that an action for damages and the removal of the obstruction would lie, in which, if the removal was not ordered, damages for permanent injury to the land could be given.—*North Shore Railway Co. v. Pion*, L.R. 14 App. Cas. 612; 59 L.J. P.C. 25; 61 L.T. 525.

(v.) **P. C.—Quebec—Drainage Rate—Municipal Taxes.**—A district rate, levied for drainage improvements, is a "municipal tax" within the Quebec Statute by which certain educational institutions are exempted from such taxes.—*City of Montreal v. Seminary of St. Sulpice*, 61 L.T. 653.

(vi.) **P. C.—Quebec—Rating of Railways.**—Under the Town Corporation General Clauses Act, 1876, s. 826, incorporated into the Quebec Act, railway companies are liable to local assessment only on the value of their land apart from the roadway and its superstructure.—*St. John's Corporation v. Vermont Central Railway*, L.R. 14 App. Cas. 590; 59 L.J. P.C. 16; 61 L.T. 441.

(i.) **P. C.**—*New South Wales—Declaration of Non-Revocation of Power of Attorney.*—By the law of New South Wales, a declaration by an attorney, that he has no notice of the revocation of his power, is conclusive proof of non-revocation, when made to a *bond fide* purchaser for value, without notice of any revocation. *Held*, that a general verdict against such a purchaser in an action to recover the property, was justified by evidence that such purchaser had cause to suspect, and did suspect, the truth of such declaration.—*Mutual Provident Society v. Macmillan*, L.H. 14 App. Cas. 596; 59 L.J. P.C. 22; 61 L.T. 486.

Company:—

(ii.) **C. A.**—*Companies Clauses Act, 1845, s. 18—Shares—Executors—Estoppel—Forged Transfer.*—Where the names of executors of a deceased shareholder are placed on the register in respect of his shares, they become joint holders in their individual capacity, though they may be described on the register as executors; and consequently the shares can only be transferred by a transfer executed by all of them. Application being made to a company to register a transfer of stock, the company sent to the registered holder a letter, stating that the transfer would be made if they did not hear from her to the contrary. No answer was received, and the transfer was made. Her signature to the transfer was a forgery: *Held* that she was not estopped from alleging that the transfer was invalid, and was entitled to have the stock replaced by the company.—*Barton v. L.N. & W.R.*, L.R. 24 Q.B.D. 77; 38 W.R. 197.

(iii.) **C. A.**—*Debentures—Power to Take Possession of all Assets—Winding-up—Receiver.*—Decision of Ch. D. (see Vol. 15, p. 4, v.) reversed.—*H. Pound, Son, and Hutchins re*, L.R. 42 Ch. D. 402; 58 L.J. Ch. 792; 38 W.R. 18.

(iv.) **Q. B. D.**—*Directors—Appointment of Director—Validity of Case—Companies Act, 1862, s. 67.*—The statutory provision that all acts of directors shall be valid, notwithstanding any defect that may be afterwards discovered in their appointments or qualifications, is not confined to acts affecting persons outside the company, but also applies to acts affecting members of the company, as a *call*.—*Briton Medical and General Life Association v. Jones* (No. 2), 61 L.T. 384.

(v.) **C. A.**—*Directors—Quorum—Allotment of Shares—Irregular.*—Decision of Ch. D. (see Vol. 14, p. 108, vi.) affirmed.—*In re Portuguese Consolidated Copper Mines*, 58 L.J. Ch. 813.

(vi.) **C. A.**—*Promoter—Misrepresentations in Prospectus—Liability.*—Decision of Ch. D. (see Vol. 14, p. 69, iv.) reversed.—*Glasier v. Rolls*, L.R. 42 Ch. D. 436; 59 L.J. Ch. 63; 38 W.R. 113.

(vii.) **Ch. D.**—*Reduction of Capital—Petition—Words “and Reduced”—Companies Act, 1867, s. 15—Companies Act, 1877, s. 4.*—An application for an order dispensing with the use of the words “and reduced” until the hearing of a petition for confirmation of a reduction of capital should be made in chambers. The minutes of an order confirming such reduction need not, unless the order would otherwise be unintelligible or misleading, state the original as well as the reduced capital. The serial numbers of shares not fully paid up, with the amount due on each must be stated in such minutes.—*In re the Solway Steamship Co.*, 61 L.T. 659.

(viii.) **C. A.**—*Shares—Issue as Fully Paid up—Contract—Companies Act, 1867, s. 25.*—A document containing an agreement to issue shares as fully paid up, executed by one party only, and which, being so executed, was filed before the issue of the shares, does not by reason of the

acceptance of its terms by the other party, constitute a contract "duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares" so as to exempt the shares from being subject to payment in cash of the whole amount thereof.—*E. p. Menzies; in re New Eberhardt Co.*, 38 W.R. 97.

(i.) **C. A.—Special Resolution—Extraordinary General Meeting—Notice.**—The articles of a company provided that seven days' notice of general meetings should be given. Notice was sent to shareholders of an extraordinary general meeting for the purpose of passing special resolutions "for voluntary liquidation, and adding that, "should such resolutions be duly passed the same will be submitted for confirmation to a subsequent extraordinary general meeting which will be held" at a place and time named. The resolutions were passed, and a copy of a financial newspaper was sent to every shareholder containing a report of the meeting, specially marked to call attention to it. No other notice of the second meeting was sent. Held, that the notice of the second meeting was insufficient, and the resolutions invalid.—*Alexander v. Simpson*, 61 L.T. 708; 38 W.R. 161.

(ii.) **C. A. & Ch. D.—Winding up—Creditor—Garnishee.**—A person who has obtained a garnishee order against a company as garnishee is not thereby constituted a creditor of the company, and cannot present a winding up petition as a creditor.—*In re Combined Weighing and Advertising Machine Co.*, 39 L.J. Ch. 26; 61 L.T. 582; 38 W.R. 67.

(iii.) **Ch. D.—Winding up—Creditor—Mortgage—Surety—Assignment of Equity.**—The P. company mortgaged property, certain directors being parties to the deed and covenanting that the P. company would pay the debt and interest. The P. company assigned its equity of redemption to the L. company, who covenanted to pay the mortgage debt and indemnify the P. company in respect thereof. The sureties were not parties. The P. company was dissolved. The sureties were forced to pay moneys under their covenant. Held, that they were not creditors of the L. company in respect of such moneys, and could not present a winding-up petition against it.—*In re The Law Courts Chambers Co.*, 61 L.T. 669.

(iv.) **Ch. D.—Winding-up—Creditors—Priority—Companies Act, 1862, ss. 87, 188, 163.**—A company having its registered office in England carried on business in Scotland. An action for damages was commenced against the company in Scotland. The company commenced a voluntary winding-up, which was afterwards continued under supervision. Meanwhile the plaintiff in the Scotch action, with notice of the winding-up, obtained a verdict and judgment, and attachment against Scotch assets of the company. Held, that the Scotch plaintiff was not entitled to any priority over the other creditors, and that he must be restrained from preventing the liquidator from dealing with the Scotch assets.—*In re The Thurso New Gas Co.*, L.R. 42 Ch. D. 486; 61 L.T. 351; 38 W.R. 158.

(v.) **H. L.—Winding-up—Distribution of Assets—Preference Shares—Ordinary Shares—Unpaid Capital.**—The articles of association of a company provided that the annual profits should be divided *pro rata* on the whole paid up capital, and that a dividend might be declared in proportion to the amounts paid up on the shares. There was no provision for the distribution of assets on a winding-up. Preference shares were issued afterwards which were fully paid-up. The ordinary shares were partly paid-up. The undertaking was sold under an Act which did not provide for the distribution of the purchase-money, and the company was wound up voluntarily. The purchase-money exceeded the amount paid

up on the shares. *Held*, that after repaying the capital paid up on the shares, the surplus ought to be divided among all the shareholders, both ordinary and preference, in proportion to the shares held, not in proportion to the amount paid up.—*Birch v. Cropper*, L.R. 14 App. Cas. 525; 61 L.T. 621.

- (i.) **C. A.—Winding-up—Proof for Arrears of Rent Charge.**—A company was mortgagee in possession of land subject to a rent charge created by deed. The company was wound up, and the liquidators paid the rent charge for some time. They then with the leave of the Court repudiated the land. *Held*, that the owner of the rent charge could not prove in the winding up for arrears of the rent charge which had accrued since the repudiation.—*H. P. Graham; in re Blackburn Building Society*, L.R. 42 Ch. D. 343; 38 W.R. 178.
- (ii.) **Ch. D.—Winding-up—Provisional Liquidator—Powers—Borrowing.**—A provisional liquidator was appointed to carry on the business of the company pending the hearing of the petition, with power to borrow a limited sum. *Held*, that the order ought to limit his powers by the words "not making any new arrangements." *Held*, also, that the order should state that the money borrowed should be "a first charge on the undertaking;" but *held*, also, that such money would not be allowed to the liquidator unless properly expended.—*In re Alexandra Palace and Park Co.*, 61 L.T. 325.
- (iii.) **C. A.—Winding-up—Sale to New Company—Validity—Sanction of Court—Companies Act, 1862, ss. 160, 161—Joint Stock Companies Arrangement Act, 1870, s. 2.**—Decision of Ch. D. (see Vol. 14, p. 70, iv.) affirmed.—*Nicholl v. Eberhardt Co.*, 61 L.T. 489.
- (iv.) **Ch. D.—English Company—Voluntary Winding-Up—Subsequent Winding-Up Order in Australia.**—A company having its registered office in England, but having a branch office and most of its business in Australia, went into voluntary liquidation. Subsequently a compulsory winding-up order was made against it in Australia. *Held*, that such order was only ancillary to the English winding-up, and could not supersede or interfere with it.—*The North Australian Territory Co. v. Goldsborough Mort & Co.*, 61 L.T. 716.

Contempt of Court:—

- (v.) **Ch. D.—Company—Winding-up—Examination—Companies Act, 1862, s. 115—Publication.**—Examinations under section 115 of the Companies Act, 1862, are for the information of the liquidator, and it is a contempt of Court to publish them prematurely. A company in liquidation brought an action against L. L. was examined under section 115. A newspaper published a report of an interview with L. containing statements alleged to have been made by her at the examination. The publisher was ignorant of the contents of the article, but did not disclose the name of the writer. *Held*, that he was responsible for the contempt, and must pay the costs of a motion to commit him.—*American Exchange in Europe v. Gillig*, 58 L.J. Ch. 708; 61 L.T. 502.

Contract:—

- (vi.) **Q. B. D.—Corporation—Contract under Seal—Extra Work—Right to Recover.**—A builder entered into a contract with a burial board under the seal of the board for the execution of repairs to the buildings of the board, the work to be done, and the terms on which it was to be done, being specified in the contract. During the execution of the work it appeared that further repairs were necessary, which were executed by

the builder at the instance of the board's surveyor, and approved by him when completed. *Held*, that the builder was not entitled to recover in respect of such further repairs, there being no contract under seal.—*Stevens v. Hounslow Burial Board*, 38 W.R. 286.

(i.) **Ch. D.**—*Interest in Land—Statute of Frauds—Agreement to Retire from Partnership*.—G., S. and B. were engaged in a partnership which owned leaseholds. The following document was signed “Rough draft. Memorandum from Gray, Smith, and Bennett. This is to record that in consideration of Gray or his executors paying Bennett or his assigns the sum of £100 on the 1st of January, 1890, and the sum of £100 on every 1st of January for the nine succeeding years Bennett agrees to withdraw from the firm of Gray, Smith, and Bennett.” *Held*, that an immediate withdrawal was meant, that the memorandum contained all the essential terms of the contract, and could be enforced against B.—*Gray v. Smith*, 58 L.J. Ch. 803; 61 L.T. 481.

(ii.) **Q. B. D.**—*Place of Performance—Purchase of Goods—Foreign Port*.—R.S.C., 1883, O. xi., r. 1 (e).—The defendant contracted to sell goods to the plaintiff to be shipped in Sweden for an English port. The ships were to be addressed to the plaintiff at the English port, and he was on arrival to adopt the charter parties and bills of lading and pay the price, which included cost, freight, and insurance. *Held*, that the contract was to be performed in Sweden, not in England, and that leave to serve in Sweden notice of the writ in an action for breach of the contract ought not to be given.—*Wancke v. Wingren*, 58 L.J. Q.B. 519.

Conversion :—

(iii.) **Ch. D.**—*Partnership—Land Speculation*.—H. and C. speculated in land together. They bought land in consideration of chief rents, and sold them in consideration of increased chief rents. A banking account was kept in their joint names, and balance sheets were made every half year, but there were no partnership articles. H. died intestate. *Held*, that the lands and chief rents which were acquired in the joint speculations were acquired for the purpose of being held as land, and that the heir-at-law of H. was entitled to his share.—*Hulton v. Lister*, 61 L.T. 467.

Costs :—

(iv.) **C. A.**—*Shorthand Notes of Evidence*.—The costs of shorthand notes of evidence are never allowed on taxation without special directions, which are only given under special circumstances; and any application for such directions must be made at or immediately after the judgment is given. After the judgment of the Court of Appeal has been passed and entered, the Court has no jurisdiction to direct such costs to be allowed.—*Glasier v. Rolls*, 38 W.R. 113.

(v.) **C. A.**—*Taxation—Review—“Objection in Writing”*.—R.S.C., 1883, O. lxv., r. 27, sub-rules, 39-41.—An application for an order for a review of taxation of a bill of costs as to any item or part of an item, cannot be entertained unless the applicant has first carried in an objection in writing with respect to each such item or part of an item.—*Strousberg v. Sanders*, 38 W.R. 117.

Criminal Law :—

(vi.) **Q. B. D.**—*Evidence—Summing-up—Power of Judge to put Evidence before Jury*.—On the trial of a prisoner the judge, in summing-up, may put before the jury evidence that has not been put in, but would have been admissible if tendered. On cross-examination of a witness at a trial before a Court of Quarter Sessions, she admitted that her

evidence differed materially from that which she had given before the magistrates. The depositions were not put in, but the chairman, in the course of summing-up the evidence, at the request of the jury, read the depositions. *Held*, that he had power to do so.—*Reg. v. Garner*, 61 L.T. 699.

(i.) **Q. B. D.**—*Inflicting Grievous Bodily Harm—Injuries Suffered while Escaping from Pursuer*—24 & 25 Vict., c. 100, s. 20.—Where one person creates in the mind of another an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind, is responsible for the injuries which result. Therefore, when, in order to escape from the violence of her husband, who had used threats to his wife amounting to threats against her life, the wife got out of a window, and in so doing fell and broke her leg, *held*, that the husband was properly convicted of having wilfully and maliciously inflicted on her grievous bodily harm.—*Reg. v. Halliday*, 61 L.T. 701.

(ii.) **C. C. R.**—*Jurisdiction after Plea of Guilty—Attempted Felony*.—The Court for Crown Cases Reserved may, after a prisoner has pleaded guilty at the trial, consider a point of law which was not formally taken at the trial. A conviction for an attempt at an offence may be supported, although the attempt could not have culminated in the full offence in the manner intended.—*Reg. v. Brown*, 61 L.T. 594; 38 W.R. 95.

Deceit:—

(iii.) **H. L.**—*False Statement in Prospectus—Good Faith—Reasonable Ground for Belief*.—To sustain an action of deceit there must be proof of fraud. If a false statement is made in the honest belief of its truth, an action for deceit is not sustained by the fact that the maker had no reasonable ground for his belief. The directors of a tramway company stated in their prospectus that they were authorized to use steam power. They had, in fact, no such authority, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the decision of C.A., *see Vol. 18*, p. 111, iv.), that an action of deceit, brought by a shareholder who had been induced by the statement to take shares, would not lie.—*Derry v. Peek*, L.R. 14 App. Cas. 337; 58 L.J. Ch. 864; 61 L.T. 265; 38 W.R. 33.

Deed:—

(iv.) **Ch. D.**—*Construction—“Exclusive Use of Gateway.”*—A. conveyed to X. a freehold house, adjoining which was a covered gateway. The deed conveyed “the exclusive use of the said gateway.” *Held*, that X. was entitled to use the gateway for all purposes, and not merely as a passage.—*Reilly v. Booth*, 61 L.T. 294.

Design:—

(v.) **H. L.**—*Infringement—Object*.—The only consideration in a question of infringement is, whether the article complained of is a copy of the registered design, and the object accomplished by the article as shewn in the design is immaterial.—*Hecla Foundry Co. v. Walker*, L.R. 14 App. Cas. 550.

(vi.) **Ch. D.**—*Novelty—Different Material—Different Classes—Patents, &c., Act, 1883, s. 47.*—An already registered design may be registered in another class for an article applied to a different purpose, but not for an article merely of a different material. Therefore, a design for a lamp-shade made of linen in the shape of a rose having been registered,

held, that a design for a lamp-shade made of china in the shape of a rose cannot be registered in another class.—*In re Bach's Design*, L.R. 42 Ch. D. 661; 38 W.R. 174.

Easement :—

(i.) **Ch. D.—Right of Way—Grant of—Undefined—User.**—In 1862 the defendants demised to the plaintiff an arch under their railway, with a right of way into V. Street. The right of way was not defined in the deed, but until 1880 the plaintiff used a particular way into V. Street. In that year the defendants made a new way which was occasionally used by the plaintiff. In 1882 the defendants put a fence across the old way, with a gate of which they gave the plaintiff the key. In 1888 they claimed to prevent the plaintiff from using the old way. Held, that as the right of way was undefined in the deed of demise the defendants had power to define it, but that they had so defined it in 1882 by giving the plaintiff the key of the gate, and could not afterwards alter the way.—*Deacon v. S.E.R.*, 61 L.T. 377.

Ecclesiastical Benefice :—

(ii.) **H. L.—Resignation—Validity—Acceptance.**—Decision of C. A. (see Vol. 12, p. 99, i.) affirmed.—*Reichel v. Bishop of Oxford*, 59 L.J. Ch. 66.

Ecclesiastical Law :—

(iii.) **C. A.—Public Worship Regulation Act, 1874, ss. 8, 9—Representation—Discretion of Bishop.**—Decision of Q. B. D. (see Vol. 15, p. 7, vi.) reversed.—*Reg. v. Bishop of London*, 38 W.R. 214.

Election :—

(iv.) **Ch. D.—Appointment—Will—Subsequent Deed.**—By marriage settlement real property of the wife, of which she was tenant in tail, and personal property of the husband and wife was covenanted to be settled on the issue as the husband and wife, or the survivor should by deed or will appoint, and in default equally. The wife died without exercising the joint power or barring the entail, and leaving five children, and the eldest son entered on the real estate as tenant in tail. The husband, in 1864, appointed the remainder of the trust property by deed to the four younger children, reserving a power of revocation; and part of the property was divided. By will, in 1869, reciting the power, he appointed specific sums to the eldest son and three of the younger children. By deed in 1878 he revoked the deed of 1864, and appointed the undivided property in equal fifths among the four surviving children and the issue of a deceased child, and reserved a power of revocation. He died in 1888. Held (1) that the will did not speak from the death so as to revoke the last deed; (2) that the will remained in force as to the share which the last deed purported to appoint to the issue of the deceased child; (3) that the eldest son was not bound to elect between the real estate and the benefits derived under the last deed, but that he was bound to elect between the real estate and the benefits derived under the will.—*Hardisty v. Wells*, L.R. 42 Ch. D. 646; 58 L.J. Ch. 835; 61 L.T. 588; 38 W.R. 229.

Estopple :—

(v.) **Ch. D.—Res Judicata.**—A *cestui que trust* sued his trustees for execution of the trust and claimed that the trustees might be charged with the loss on alleged improper investments. Judgment was given for execution of the trusts and inquiries as to investments. Certain

other *cestuis que trusts* (infants) were served with the judgment, and had leave to attend. A compromise was effected, and was sanctioned on behalf of the infants on a petition. The petition did not refer to the alleged improper investments, but the fact of a certain investment having been made, appeared in the answers of the trustees to interrogatories in the action. After the infants came of age they sued the trustees in respect of the investment. Held, that the question as to the breach of trust was not *res judicata*, and that the plaintiffs were not estopped by the former action.—*Worman v. Worman*, 61 L.T. 637.

See Company, p. 35, ii.

Evidence.—*See Legitimacy*, p. 44, vii.

Executor.—*See Administration*, p. 28, vii. *Company*, p. 35, ii.

Gas Company:—

(i.) **Q. B. D.**—*Gasworks Clauses Acts*, 1847 & 1871, ss. 11 & 36—*Metropolis Gas Act*, 1860, s. 17—*Supply of Gas—Notice*.—A metropolitan gas company to which the Acts of 1847, 1860, and 1871 apply is bound to give a supply of gas a reasonable time after notice by the consumer, and is not entitled to a seven days' notice under the Act of 1860.—*South Metropolitan Gas Light & Coke Co. v. Noakes*, 61 L.T. 556.

Husband and Wife:—

(ii.) **P. D.**—*Aggravated Assault—Protection Order—Fine of Husband—Appeal—Evidence*—24 & 25 Vict., c. 100, ss. 42, 43.—If the magistrates who hear a summons by a wife find her husband guilty of an aggravated assault on her, they may impose a penalty which could be inflicted for a common assault, and may, without hearing any evidence on behalf of the husband, make a protection order, and order the husband to provide for the wife's maintenance. It is not necessary that there should be two hearings. The Court refused, on an appeal from such a protection order, to enter into the merits of the case, or to receive evidence offered to induce the Court to review the magistrate's decision on the facts.—*Powell v. Powell*, L.R. 14 P.D. 177; 61 L.T. 436.

(iii.) **Q. B. D.**—*Alimony—Married Women (Maintenance in Case of Desertion) Act*, 1886.—The Act of 1886 is retrospective, and an order may be made under it for alimony against a husband who deserted his wife in 1881.—*Reg. v. Birwistle*, 58 L.J. M.O. 158.

(iv.) **P. D. & C. A.**—*Divorce—Alimony—Dum Sola*—20 & 21 Vict., c. 85, s. 32.—The insertion or omission of a "dum sola" clause in an order for permanent alimony is within the discretion of the Court, and no *prima facie* rule ought to be laid down with reference thereto.—*Lister v. Lister*, L.R. 14 P.D. 175; 15 P.D. 4; 38 W.R. 81.

(v.) **P. D.**—*Divorce—Costs—Intervention of Queen's Proctor*.—In cross-petitions for divorce by husband and wife a decree nisi was pronounced on the wife's petition, and the husband was condemned in costs. He paid money into Court to meet the wife's costs. The Queen's Proctor intervened, charging the wife with adultery, collusion, and suppression of material facts. Held, that the sum in Court could not be paid out to the wife till the decree was made absolute.—*Butler v. Butler*, L.R. 14 P.D. 160; 58 L.J. P. 71.

(i.) **P. D.—Divorce—Cross-Petitions—Alimony Pendente Lite.**—On cross petitions by husband and wife the jury found that the husband had, but the wife had not, committed adultery, and a decree nisi for divorce was made. The Queen's Proctor intervened, and a second trial took place, in which the jury found that the parties had acted in collusion, but could not agree as to a charge of adultery against the wife. The decree was accordingly rescinded. The wife appealed, and the husband had ceased to pay alimony. *Held*, that the order for payment of alimony ought to be renewed until further order, but that a writ of *fi. fa.* to enforce arrears of alimony could not be granted.—*Butler v. Butler*, L.R. 15 P.D. 13.

(ii.) **P. D.—Divorce—Magistrate's Order—Allowance—Legacy to Husband—Receiver.**—A husband having been convicted of an aggravated assault on his wife, a magistrate made an order that she should not be bound to cohabit with him, and that he should pay her a weekly allowance. She petitioned for a divorce, and the husband was ordered to pay and give security for certain sums in respect of her costs. He was entitled to a legacy. *Held*, that an injunction should be granted to restrain him from receiving the legacy till the hearing or till payment of the costs, but that it should not be extended to secure the payment of the weekly allowance.—*Gillett v. Gillett*, L.R. 14 P.D. 158; 58 L.J. P. 84; 61 L.T. 401; 38 W.R. 144.

(iii.) **P. D.—Judicial Separation—Custody of Child—Death of Parent—22 & 23 Vict., c. 61, s. 4.**—On the death of the parent who, under a decree of judicial separation, is entitled to the custody of a child of the marriage, the Court cannot entertain an application by a stranger for the custody of the child.—*Davis v. Davis*, L.R. 14 P.D. 162; 58 L.J. P. 88.

(iv.) **P. D.—Restitution of Conjugal Rights—Demand Previous to Suit—Evidence of Incontinence before Marriage—Alimony not Decided at Hearing of Petition—47 & 48 Vict., c. 68, s. 2.**—Where a wife petitioning for restitution of conjugal rights had made conciliatory applications to her husband, after which her solicitors wrote to him asking him to take back his wife and threatening proceedings in default, *held*, that there had been a sufficient conciliatory demand previous to suit. *Held*, that evidence of incontinence on the part of the petitioner before the marriage to show that her child, born after the marriage, was not the respondent's child was not relevant. *Held*, that on the hearing of the petition the Court would not consider the amount of alimony to be allowed in case the decree for restitution should not be complied with.—*Mason v. Mason*, 61 L.T. 304.

(v.) **P. D.—Restitution of Conjugal Rights—Written Demand.**—After eleven years' separation a wife by letter formally demanded from her husband a return to cohabitation, and threatened to commence legal proceedings in the event of a refusal. *Held*, not to be a proper demand.—*Smith v. Smith*, L.R. 15 P.D. 11; 61 L.T. 697.

(vi.) **Ch. D.—Gift to—Effect of.**—A testator gave his residue to A. and B. his wife, C. the wife of X., D. the wife of Y., E., F., and G. his wife. *Held*, that the residue was divisible into sevenths, A. and B. his wife and F. and G. his wife each taking a separate share.—*Byram v. Tull*, L.R. 42 Ch. D. 306; 61 L.T. 718; 38 W.R. 91.

Income Tax:—

(vii.) **H. L.—Business carried on Abroad—Partner in England—Profits not Remitted to England.**—Decision of C.A. (see Vol. 13, p. 114, vi.) affirmed. *Colquhoun v. Brooks*, L.R. 14 App. Cas. 493; 61 L.T. 618.

Infant:—

(i.) **Ch. D.—Apprenticeship—Covenant—Injunction.**—An infant cannot be sued on a covenant purporting to be entered into by him in an apprenticeship deed, and therefore will not be restrained by injunction from committing a breach of a negative stipulation in such a deed.—*Francesco v. Barnum*, 38 W.R. 187.

(ii.) **Q. B. D.—Manager of Children's Home—Rights over Child placed in Home.**—A child whose father had deserted his family was placed in a boy's home. The parents were Protestants and the child was brought up as a Protestant. The mother subsequently joined the Roman Catholic Church and applied for the restoration of the child. The father had not been heard of. The child was nearly ten years of age. Held, that the manager of the home had acquired no rights over the child, and must restore it.—*Reg. v. Barnardo* (No. 2), 58 L.J. Q.B. 522.

(iii.) **Q. B. D.—Void Contract—Money Paid—Right to Recover—Goods Used.**—An infant who has, under a contract, paid money for goods which he has consumed or used, cannot recover back from the vendor the money so paid, although the contract is void under the Infants' Relief Act, 1874, sec. 1.—*Valentini v. Canali*, 61 L.T. 781.

Insurance:—

(iv.) **C. A.—Accident—Obvious Risk.**—An accidental death policy excepted from the risks insured against accidents happening “by exposure of the insured to obvious risk of injury.” The insured attempted to cross a railway when a train was approaching and was killed. There was no evidence that he was short-sighted or deaf. There was no proper crossing or station at the place, and no obstruction to prevent a view of the approaching train. There was no ground to impute negligence to the company's servants. Held, that the accident was within the exception.—*Cornish v. Accident Insurance Co.*, L.R. 23 Q.B.D. 453; 58 L.J. Q.B. 591; 38 W.R. 189.

Landlord and Tenant:—

(v.) **Ch. D.—Agreement for Lease—Breach of Covenant—Acceptance of Rent—Conveyancing Act, 1881, s. 14.**—Section 14 of the Conveyancing Act, 1881, applies to an agreement for a lease of which the tenant is entitled, independently of the Act, to demand specific performance. A tenant was in possession of land under an agreement by which he was entitled to a lease on fulfilling certain conditions as to building. The conditions were, to the landlord's knowledge, not fulfilled by the specified time, but the landlord demanded rent as under the lease. Held, that the landlord could not stipulate that the rent was to be received “without prejudice to any breaches of covenant made up to that time in the agreement.”—*Strong v. Stringer*, 61 L.T. 470.

(vi.) **Q. B. D.—Claim for Compensation—Notice—Time—Determination of Tenancy—Agricultural Holdings Act, 1883, s. 7.**—A tenant holding about 1,200 acres gave notice, in accordance with the terms of his agreement, that he would quit his farm on October 11th, 1888. On that day he gave up possession of 1,000 acres, but retained about 200 acres till February, 1889, in accordance with the custom of the country, which custom was recognised in the agreement. Held, that notice of a claim for compensation, relating to the whole 1,200 acres, given two months before he gave up the 200 acres, was given in sufficient time.—*E. p. Earl of Portarlington; in re Paul*, 59 L.J. Q.B. 80.

- (i.) **C. A.**—*Distress for Rent—Charges—Percentage Fee—Agricultural Holdings (England) Act, 1888, s. 49, Sched. 2.*—The bailiff and not the landlord is entitled to the percentage fee for “levying distress” specified in the second schedule to the Agricultural Holdings Act, 1883.—*Phillips v. Rees*, L.R. 24 Q.B.D. 17; 59 L.J. Q.B. 1; 61 L.T. 712; 38 W.R. 53.
- (ii.) **Q. B. D.**—*Housing of the Working Classes Act, 1885, s. 12—Implied Condition—Right of Action.*—A tenant, being a person belonging to the working classes, has a right of action against his landlord for injuries caused by the demised premises not being reasonably fit for human habitation; owing to any defective state of repair.—*Walker v. Hobbs*, L.R. 23 Q.B.D. 458; 61 L.T. 688; 38 W.R. 63.
- (iii.) **Q. B. D.**—*Notice to Quit—Sufficiency.*—By an agreement for a lease for five years, it was provided that the tenancy might be determined “after the expiration of the term of three years out of the term of five years” by six months’ notice in writing, such notice to expire at the corresponding quarter-day at which the tenancy commenced. The tenancy commenced on September 29th, 1885, and on March 23rd, 1888, the tenant wrote to the landlord, “I intend to surrender to you the tenancy of this house on or before the 29th September, 1888.” *Held*, that the notice was not an absolute notice to quit, and was therefore bad. *Sembly*, that the agreement was for a term of four years certain.—*Gardner v. Ingram*, 61 L.T. 729.
- (iv.) **C. A.**—*Removal of Goods—Bill of Sale—11 Geo. II., c. 19, ss. 1, 8—Bills of Sale Act, 1882, s. 13.*—A landlord cannot sue for the fraudulent removal of goods to avoid a distress, where the goods have become, by the execution of a bill of sale, the property of the bill of sale holder. A landlord cannot sue under section 13 of the Bills of Sale Act, 1882, where the goods of the tenant, granted by him under a bill of sale, have been removed by the grantee, with the consent of the tenant, within five days of the seizure.—*Tomlinson v. Consolidated Credit & Mortgage Corporation*, L.R. 24 Q.B.D. 135; 38 W.R. 118.
- (v.) **Q. B. D.**—*Tenancy from Year to Year—Covenant for Quiet Enjoyment—Eviction by Superior Landlord.*—In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the lessor’s interest, and if, on such determination, the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his lessor for damages for such eviction.—*Schwarz v. Locket*, 61 L.T. 719; 38 W.R. 142.

Land Registration :—

- (vi.) **Q. B. D.**—*Local Government Charges—“Land Charges”—Land Registration and Searches Act, 1888, ss. 4, 10.*—Expenses incurred by a local authority in respect of premises, which are, by the Public Health Act, 1875, sect. 257, made a charge on such premises, do not require registration as “land charges.”—*Rey v. Holt*, 38 W.R. 236.

Legitimacy :—

- (vii.) **Ch. D.**—*Paternity of Child Born in Wedlock—Presumption—Evidence to Rebut.*—The presumption of the legitimacy of a child born in wedlock, held to be rebutted by evidence which satisfied the Court that the husband could have had no access to the wife. Evidence of statements

made by X., on account of whose adultery with the wife the marriage had been dissolved, previously to the birth of a child, held to be admissible as evidence to shew that he was the father. Held, also, that the evidence of a husband is not admissible, after the dissolution of a marriage on the ground of the wife's adultery to prove that he was not the father of a child born in wedlock. It being proved that the register of births kept at the Mairie of a French town could not be removed, held, that the contents of the entry of the birth of a child in such register could be proved by a copy, the accuracy of which was proved by a witness who had himself compared it with the original.—*Burnaby v. Baillie*, L.R. 42 Ch.D. 282; 58 L.J. Ch. 842; '61 L.T. 634.

Licensing:—

(i.) **Q. B. D.**—*Transfer—Renewal—Neglect of Occupier to Apply—Jurisdiction—Licensing Act, 1828, ss. 4, 14—Licensing Act, 1872, s. 75, schd. 2.*—A licensee, convicted of an offence against the Licensing Acts, declined to quit until the last day of the General Licensing Sessions. A new tenant obtained a temporary license, and applied at the next special session for a transfer of the former license, on the ground that the former holder had "wilfully omitted or neglected to apply" for a renewal at the General Sessions. The justices refused the application. Held, that the justices at quarter sessions had jurisdiction to entertain an appeal, the application being for a transfer of a license, and not for a new license.—*Thornton v. Clegg*, L.R. 24 Q.B.D. 132; 59 L.J. M.C. 6; '61 L.T. 562; 38 W.R. 160.

Life Assurance:—

(ii.) **Ch. D.**—*Premiums—Payment by Stranger—Lien.*—A. was entitled to a policy on his life in the X. company, and to certain land. He mortgaged the policy and the land to the company, the deed providing that the mortgage should not be called in so long as the premiums were paid, and that if they were not duly paid, they might be paid by the company and added to the security. He sold the land to S., subject to the mortgage. The premiums were not paid, and the company threatened to call in the mortgage. S. then paid the premiums. Held, that a request by the company to S. to pay the premiums could not be implied from the threat, and that S. was not entitled as against A. to a lien on the policy for the premiums so paid.—*Strutt v. Tippett*, 61 L.T. 460.

Life Assurance Company:—

(iii.) **Ch. D.**—*Deposit—Investment—Board of Trade Rules, 1872, r. 4.*—The Court has power to sanction the investment of money deposited in Court by a life insurance company in annuities (class B), of the East Indian Railway Company.—*In re Blue Ribbon Life, &c., Assurance Co.*, 61 L.T. 660; 38 W.R. 104.

(iv.) **Ch. D.**—*Power to Transfer Business—Policy Holders.*—A life assurance company which has, under its deed of settlement, no power to sell or transfer its life assurance business, cannot enter into any arrangement for the sale or transfer of such business under sec. 14 of the Life Assurance Companies Act, 1870. Where annuities are secured by the guarantee, under seal, of a life assurance company, to trustees for the annuitants, such trustees are policy holders, within the meaning of sections 2 and 14 of the Act.—*In re Sovereign Life Assurance Co.*, L.R. 42 Ch. D. 540; 58 L.J. Ch. 811; 61 L.T. 455; 38 W.R. 58.

Limitations:—

(i.) **Ch. D.—Acknowledgment.**—A. lent to K. a sum of money to purchase a seat on the New York Stock Exchange. After A.'s death, K. wrote to the plaintiff, A.'s son and executor; "the great kindness of your father on every occasion, and more especially the money that he loaned me to purchase my seat on the New York Stock Exchange, place me now in your debt. I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York." The seat was sold. The plaintiff sued K.'s executrix for the debt. Held, that the letter was a sufficient acknowledgment to take the case out of the statute.—*Duke of Buccleuch v. Eden*, 61 L.T. 360.

(ii.) **H. L.—Entry Against Interest.**—S. purchased leasehold property and borrowed from N. money to complete. He deposited the deeds with N. by way of equitable mortgage. The action to enforce the security was barred, unless supported by an entry made by N. in his diary acknowledging the receipt from S. of £50, "on account of rent and interest." Held, that such entry was insufficient, as there was no evidence to connect it with the property.—*Newbould v. Smith*, L.R. 14 App. Cas. 428.

(iii.) **Q. B. D.—Express or Resulting Trust—Will.**—A testator devised the freehold house in which he lived, and all other his real estate to his widow and another, his executors, upon certain trusts as to the house, but without any trusts as to the other real estate. He died, seised of two houses besides that in which he lived. The widow took possession and received the rents of these houses for more than twelve years. In an action by the heir-at-law against her, held, that the will raised an express trust in favour of the heir-at-law, and that the statute of limitations did not run against him.—*Patrick v. Simpson*, L.R. 24 Q.B.D. 128; 59 L.J. Q.B. 7; 61 L.T. 686.

(iv.) **Ch. D.—Gift of Real and Personal Estate—Charge of Debts—Advertisement for Creditors—Claim not Equivalent to Action.**—A testator gave all his property in trust for sale and conversion, and "after payment thereout" of debts to be held on certain trusts. The executor advertised for creditors, and a creditor sent in a claim. The executor asked for particulars which were not supplied, and afterwards more than six, but less than twelve, years after the alleged debt was incurred, took out a summons, asking that the claim might be adjudicated on by the Court. Held (1), that sending in a claim was not equivalent to bringing an action, and (2), that, as to the real estate, the debts being charged thereon by the will, the period of limitation was twelve years, not six. Quare whether as to the proportion of the debt properly attributable to the personal estate, the claim was not barred.—*Warburton v. Stephens*, L.R. 43 Ch. D. 39; 61 L.T. 609.

(v.) **H. L.—Possession of Tenants—Receipt of Rent by Agent—3 & 4, Will. IV, c. 27, ss. 8, 34—37 & 38 Vict., c. 57, s. 1.**—Decision of C. A. (see Vol. 12, p. 103, 1), reversed.—*Lyell v. Kennedy*, L.R. 14 App. Cas. 437.

(vi.) **C. A.—Principal and Surety—Mortgage—Mercantile Law Amendment Act, 1856, s. 14—Real Property Limitation Act, 1874, s. 8.**—Decision of Ch. D. (see Vol. 14, p. 112, iv.) affirmed.—*Allison v. Frisby*, 61 L.T. 632; 38 W.R. 65.

(vii.) **Ch. D.—Solicitor—Negligence.**—A client's right of action against his solicitor for negligence arises when the negligent act is committed, not when it is discovered, it not being the solicitor's duty continuing day by day to disclose his negligent act.—*Wood v. Jones*, 61 L.T. 551. See *Solicitor*, p. 63, iii.

Local Government:—

- (i.) **Q. B. D.**—*County Council—Quarter Sessions—Joint Committee—Buildings—Local Government Act, 1888, s. 30.*—The standing joint committee of the Quarter Sessions and the County Council has exclusive control over the buildings and premises for the accommodation of Quarter Sessions, justices out of Sessions, police, and clerks to justices. The County Council must raise and pay such sums as are required by the committee, and has no power to veto any such requirements. — *E. P. Somerset County Council*, 58 L.J. Q.B. 513; 61 L.T. 512.
- (ii.) **C. A.**—*Expenses—Charge on Premises—Date of Charge—Limitations—Local Government Act, 1858, s. 62.*—Decision of Q. B. D. (see Vol. 14, p. 112, iv.) affirmed.—*Hornsey Local Board v. Monarch Building Society*, L.R. 24 Q.B.D. 1; 38 W.R. 85.
- (iii.) **Q. B. D.**—*New Street—Ancient Highway Altered—Repairs—Public Health Acts, 1875, s. 150.*—An ancient footpath or highway, the original track of which has been partially altered, widened, and added to, and abutting on which houses have been built, is a new street, and repairable by the frontagers.—*Evans v. Newport Sanitary Authority*, 59 L.J. M.C. 8; 61 L.T. 684.
- (iv.) **Ch. D.**—*New Street—Width—Bye-Law.*—The H. Local Board provided by a bye-law that any person laying out a new street should make it forty feet wide at least, with an opening at one end at least of the same width. P. was making a new street, the land at each end of which did not belong to him. Held, that he was bound to provide such an opening into the street as was required by the bye-law, which was not *ultra vires* or unreasonable.—*Hendon Local Board v. Pounce*, L.R. 42 Ch. D. 602; 61 L.T. 465.
- (v.) **C. A.**—*Office of Local Authority—Fee or Reward—Public Health Act, 1875, ss. 189, 193.*—Decision of Q. B. D. (see Vol. 14, p. 40, iv.) affirmed.—*Edwards v. Salmon*, L.R. 23 Q.B.D. 531; 58 L.J. Q.B. 571; 38 W.R. 166.
- (vi.) **C. A.**—*Powers for Lighting—General and Special Expenses—Assessment of Railway—Public Health Act, 1875, ss. 161, 207, 211, 229, 230, 276, 295.*—The Local Government Board ordered that the provisions of the Public Health Act with respect to street lighting should be in force in a township contributory to the rural sanitary authority of B., and invested such rural authority with the powers of an urban sanitary authority “under those provisions.” Held, that the expenses of carrying out such provisions were general and not special expenses, and must be defrayed as such, and consequently that a railway company was not entitled under section 211 to be rated on one-fourth of its rateable value.—*L. & Y. R. v. Bolton Union*, L.R. 23 Q.B.D. 555; 58 L.J. Q.B. 526.

Marine Insurance:—

- (vii.) **Q. B. D.**—*Lloyd's “Running Down” Clause—Further Insurance—Collision—Both Vessels to Blame—Indemnity.*—The defendant's ship, B., was insured on a policy containing the Lloyd's “running down clause,” insuring the shipowner against three-fourths of the sum he might have to pay the owner of another vessel for damage done to it by collision with the insured vessel. The same ship was insured with the plaintiffs, who undertook to indemnify the defendants against damage to any other ship so far as such damage was not covered by the “running down clause.” The B. collided with the K.; both were to blame, but the B. was the more damaged. The owners of the K., by agreement, paid the defendants a sum of money for excess of damage. Held, that

the defendants had not become liable to pay any sum in consequence of the collision within the meaning of the "running down clause," and were consequently not entitled to any indemnity from the plaintiffs, and that the sum so paid to them belonged to the plaintiffs.—*London Steamship Owners' Mutual Insurance Association v. Grampian Steamship Co.*, L.R. 24 Q.B.D. 32; 38 W.R. 190.

Married Woman :—

(i.) **Q. B. D.**—Contract—*Binding on Separate Estate—Inference—Married Women's Property Act, 1882, s. 1, sub-s. 3.*—A married woman will not be considered to intend to bind her separate estate by a contract if at the time of such contract she had no separate estate which she could reasonably be supposed to have intended to bind. Therefore where a married woman had separate property without power of anticipation, and had, at the time of making a contract, spent all the income then accrued in clothing for herself and her children, held, that she could not, be supposed to have intended to bind such clothing.—*Leake v. Driffield*, L.R. 24 Q.B.D. 98; 38 W.R. 93.

(ii.) **C. A.**—Will—*Married Women's Property Act, 1882, s. 1, sub-s. 1, ss. 2, 5.*—A married woman has, under the Married Women's Property Act, 1882, section 1, sub-section 1, power to dispose only of property falling within the scope of sections 2 and 5. By marriage settlement the wife's property was limited in default of issue, which event happened, upon trust for her absolutely if she survived her husband, but if she should die in his life-time on such trusts as she should by will appoint, and in default for her next-of-kin. She made a will while under coverture by which she appointed the settled property and made a general bequest of all the property which she could dispose of by will. She survived her husband, and died without having republished her will. Held, that the will did not dispose of the settled property.—*Mansfield v. Mansfield*, L.R. 43 Ch. D. 12.

Master and Servant :—

(iii.) **C. A.**—*Common Employment—Sub-contractor.*—H. contracted to erect a house under a contract, which stipulated that he was to pay L. a fixed sum to erect a fire-proof flooring, and to allow L. the use of his scaffolding, and to provide necessary attendants for doing the work. The plaintiff, a servant of H., was injured through the negligence of a man employed by L., and sued L. Held, that L. was a sub-contractor under H., and was with his workmen in the employment and under the general control of H., that there was a common employment and a common master and that consequently L. was not liable.—*Johnson v. Lindsay*, L.R. 23 Q.B.D. 508; 58 L.J. Q.B. 581, 38 W.R. 119.

(iv.) **Q. B. D.**—*Payment of Wages otherwise than in Coin—Truck Act, 1881—Truck Amendment Act, 1887.*—The respondent, who was a licensed victualler and also a brickmaker, supplied workmen employed in his brickfield with beer to the amount of 3s. 10d. on credit, debiting them in his books with the amount. In the evening of the same day, the workmen being in the respondent's public-house, he handed them 4s. with which they paid for the beer and received the 2d. change. On the following day the men received their wages in coin, the sum of 4s. having been deducted. Held, that the employer had committed an offence against the Truck Acts.—*Gould v. Haynes*, 61 L.T. 732.

Merchandise Marks :—

(v.) **Q. B. D.**—*False Trade Description—Intent to Defraud—Merchandise Marks Act, 1887, s. 2, sub-s. 2.*—It is no defence to a charge against a

person of having in his possession for sale goods to which a false trade description is applied, that there was no intention to defraud the immediate purchaser, and that he was in fact not defrauded.—*Wood v. Burgess*, 61 L.T. 593.

(i.) **Q. B. D.—False Description—Intent to Defraud—Merchandise Marks Act, 1887, s. 2, sub-s. 1.**—The respondents, who were gunpowder manufacturers, contracted to supply the Government with powder. They bought German powder, put it into barrels supplied by the Government, and labelled them as if the powder was of their own make. The powder so supplied was not inferior in quality to that of their own make. Held, that they were guilty of the offence of applying a false trade description to goods, and had acted with intent to defraud, it not being necessary to constitute such offence that there should be an intention to supply an inferior article.—*Starey v. Chilworth Gunpowder Co.*, L.R. 24 Q.B.D. 90; 38 W.R. 204.

Metropolis Management:—

(ii.) **C. A.—Power to Seize Things in Footway.**—The power given by section 63 of 57 Geo. III., cxix. (Michael Angelo Taylor's Act), to the authority having control of pavements, to seize wares, and other matters placed on footways or carriage-ways, may be exercised, although there has been no conviction under the section.—*Brackley v. Vestry of St. Mary, Battersea.*—L.R. 23 Q.B.D. 486; 58 L.J. Q.B. 589; 38 W.R. 28.

(iii.) **Q. B. D.—Vestry—Superannuation—Amount**—29 & 30 Vict., c. 91, ss. 1, 4.—A metropolitan vestry had decided that a resigning officer was entitled to a pension, but on his declining to accept one of a less amount than according to the statutory scale, dismissed him without pension. Held, that the vestry had not properly exercised their discretion. Mandamus issued to the vestry to compel them to hear and determine the matter.—*Reg. v. St. Pancras Vestry*, 38 W.R. 238.

Mortgage:—

(iv.) **C. A.—Public House—Possession by Mortgagees—Accounts—Limit of Sum to be Recovered.**—Mortgagees of a public-house took possession, and let the house with a restriction that the tenant should buy his beer entirely from them. Held, that they must account for such rent as they could have obtained on a letting without restriction, but not for the profits made by the sale of beer to the tenant. The mortgage was of a leasehold to secure £700, and such further sums as might become due, for money advanced, goods sold, or otherwise. The power of sale provided that the sale moneys should be applied in reimbursing the mortgagees for costs, insurance, repairs, &c., and subject thereto in payment of principal and interest, and there was a proviso “that the total amount to be recovered by the mortgagees under these presents shall not exceed £900.” Held, that the proviso did not apply to interest, costs, repairs, insurance, &c., but only to moneys lent and goods supplied.—*White v. City of London Brewery Co.*, L.R. 42 Ch. D. 237; 58 L.J. Ch. 855; 38 W.R. 82.

(v.) **Ch. D.—Mortgagee in Possession—Receiver.**—A receiver may be appointed at the instance of a legal mortgagee, but he has no absolute right to a receiver. A mortgagee having taken possession cannot relinquish it at pleasure, and, as a general rule, the Court will not assist him to do so by appointing a receiver.—*Prytherch v. Williams*, L.R. 42 Ch. D. 590; 38 W.R. 61.

See Bankruptcy, p. 30, vii.

Municipal Corporation :—

(i.) **C. A.**—*Contract by—Ultra Vires—Surplus of Borough Fund—Application of—Municipal Corporations Act, 1882, ss. 140, 143, 144.*—A corporation contracted to pay certain annual sums for the purpose of freeing a bridge from tolls. They were authorised to raise rates for purposes which did not include such a bridge, and the surplus of the rates was to be applied under section 143 of the Municipal Corporations Act, 1882. *Held*, that the corporation could not apply money derived from the rates, or make rates to create surpluses to be applied, to payments under the contract; but that the agreement was not illegal or invalid, and that surpluses might arise which would be legally applicable to make such payments. Declaration made that the defendants were not entitled to pay moneys which might become due under the agreement out of the borough funds, nor make any rates for the purpose of such payments, with liberty for the plaintiff to apply if the defendants should shew any intention of so misapplying their funds; the declaration not to prevent the making of such payments out of surpluses which there might be of the rates. Payment may not be made out of the borough funds of a judgment for a sum not legally payable out of such fund.—*A. G. v. Mayor of Newcastle*, L.R. 23 Q.B.D. 492; 58 L.J. Q.B.D. 558.

Municipal Election :—

(ii.) **Q. B. D.**—*Report of Commissioner—Corrupt Practices—Jurisdiction to Amend Report—Notice—Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 23, Sched. III., Part II.*—When, after the trial of a municipal election petition, the commissioner has reported persons as guilty of corrupt practices, the High Court has no jurisdiction to set aside, or amend, the report on the ground that the proper notice has not been given to the persons so reported.—*Preece v. Harding*, L.R. 24 Q.B.D. 110.

Nuisance :—

(iii.) **Ch. D.**—*Injury—Reasonable Use.*—In cases of nuisance the test is not whether the defendant's use of his own property is reasonable, but whether such use injures his neighbour. Injunction granted to restrain the use of a stove in a kitchen which rendered the wine-cellar in the adjoining house unfit for ordinary use, although the use of the stove was reasonable in itself.—*Reinhardt v. Mentasi*, L.R. 42 Ch. D. 685; 58 L.J. Ch. 787; 61 L.T. 328; 38 W.R. 10.

Partnership :—

(iv.) **C. A.**—*Action for Dissolution—Arbitration—Clause in Articles—Staying Proceedings.*—The plaintiff sued for dissolution of partnership. The defendant moved for a stay of proceedings in order that, in accordance with the articles, all disputes might be referred to arbitration. *Held*, that the motion must stand over till the trial. *Held*, by Key, J., that the arbitrator has no power under such a clause to decide whether or not the partnership should be dissolved.—*Joplin v. Postlethwaite*, 61 L.T. 629.

Patent :—

(v.) **C. A.**—*Exclusive License—Right of Licensee to Sue.*—An exclusive license is leave to do a thing, and a contract not to allow any one else to do it; but, unless coupled with a grant, it confers no interest or property in the thing, and does not entitle the licensee to sue in his own name.—*Heap v. Hartley*, L.R. 42 Ch. D. 461; 58 L.J. Ch. 790; 61 L.T. 538; 38 W.R. 186.

(i.) **C. A.**—*Past Infringement—Action.*—In August 1882, A. set up in B.'s mill machines of his own make on trial. In April 1888, B., being dissatisfied with the machines, took them down and requested A. to remove them. In 1887, P. having established against A. that the machines were an infringement of his patent, claimed royalties against B., and in 1888 sued B. in the Palatine Court for an injunction and damages. *Held*, that though B. had infringed the patent, it could not be inferred that he had any intention of infringing it again, and that it was not a case for an injunction, and that, as the Palatine Court had only the old Chancery jurisdiction, damages in lieu thereof would not be given.—*Proctor v. Bayley*, L.R. 42 Ch. D. 390; 59 L.J. Ch. 12; 38 W.R. 100.

(ii.) **Ch. D.**—*Petition for Revocation—Respondent out of Jurisdiction—Notice—Procedure.*—The sole respondent to a petition for the revocation of a patent was a domiciled Scotchman resident in Scotland. A copy of the petition and particulars of objections had been delivered to him personally, and he had declined to appear on the ground that he was not subject to the jurisdiction. *Held*, on an application for directions, that an order *nisi* should be made that unless the respondent should appear by a specified day and show cause to the contrary (in which case he might dispute the jurisdiction) the petition should be tried with *vide voce* evidence, and be set down in the list of witness actions.—*In re Drummond's Patent*, L.R. 43 Ch. D. 80.

(iii.) **Ch. D.**—*Threats of Proceedings—Action to Restrain Threats—Cross Action for Infringement—Costs—Patents, &c., Act, 1883, s. 32.*—A solicitor's letter saying that proceedings will be instituted is a threat within the meaning of the section. The action for infringement pointed to by the section is an action against the person threatened. Where there is an action to restrain threats the defendant need not assert his rights by defence or counter claim, but may bring a separate action for infringement. If he does so proceedings in one action ought to be stayed to abide the result of the other. A. sued X. to restrain threats. X. within ten days brought a cross action against A. for infringement. After notice of trial in both actions A. offered to stay his action until the conclusion of the other, but X. refused and both actions were tried together. X.'s action was dismissed with costs. *Held*, that A. had lost his right of action in consequence of X. having commenced his action within a reasonable time and prosecuted it with due diligence, and that A.'s action must therefore be dismissed, but without costs.—*Combined Weighing and Advertising Co. v. Automatic Weighing Machine Co.*, L.R. 42 Ch. D. 665; 61 L.T. 474; 38 W.R. 233.

Pawnbroker:—

(iv.) **Q. B. D.**—*Sale of Pledge—Deficit—Right to Recover—Pawnbrokers Act, 1872, s. 22.*—There is nothing in the Pawnbrokers Act to take away the common law right of the lender to recover the amount lent, and therefore if the sale of an unredeemed pledge results in a deficit, the pawnbroker may recover such deficit by action against the pledgor.—*Jones v. Marshall*, 61 L.T. 721.

Perpetuity:—

(v.) **Ch. D.**—*Legal Limitations—Estate to Unborn Person—Restraint on Anticipation.*—By marriage settlement lands were conveyed to the use of the husband and wife successively for their lives, with remainder to the use of a child, grandchild, or more remote issue as the husband and

wife should by deed appoint, such child, grandchild, or more remote issue being born before the appointment. In exercise of the power an appointment was made to the use of a married daughter for life to her separate use without power of anticipation, remainder to such uses as she should appoint by will, and in default to the use of her children living at the date of the appointment. Held, that the only part of the appointment which was good was the limitation to the daughter for life for her separate use, and that the restraint on anticipation was bad.—*Whithy v. Mitchell*, L.R. 42 Ch. D. 494; 59 L.J. Ch. 8; 61 L.T. 353; 38 W.R. 5.

Poor Law:—

- (i.) **C. A.**—Rating—*Sewage Farm—Loss in Working—Pumping Station*.—Decision of Q. B. D. (see Vol. 15, p. 14, iv.) reversed.—*Burton-on-Trent Corporation v. Egginton Churchwardens*, 59 L.J. M.C.; 38 W.R. 181.
- (ii.) **H. L.**—Settlement.—Decision of C. A. (see Vol. 13, p. 15, v.) reversed.—*Reigate Guardians v. Croydon Guardians*, L.R. 14 App. Cas. 465.
- (iii.) **H. L.**—Settlement—*Child—Emancipation—Widowed Mother—Divided Parishes Act, 1876, ss. 34, 35*.—Decision of C. A. (see Vol. 13, p. 126, iv.) reversed.—*Highworth Guardians v. Westbury Guardians*, L.R. 14 App. Cas. 465.
- (iv.) **H. L.**—Settlement—*Residence—Widow—Divided Parishes Act, 1876, s. 34*.—Decision of C. A. (see Vol. 14, p. 15, iii.) affirmed.—*Medway Guardians v. Bedminster Guardians*, L.R. 14 App. Cas. 465.
- (v.) **C. A.**—Settlement—*Child under Sixteen—Derivative Settlement—Divided Parishes Act, 1876, s. 35*.—In determining the settlement of a pauper under the age of sixteen the father's settlement could not be ascertained, held, that the mother's derivative settlement might be inquired into.—*West Derby Guardians v. Atcham Guardians*, L.R. 24 Q.B.D. 117.
- (vi.) **Q. B. D.**—Settlement—*Pauper aged Sixteen—Residence with Father—Divided Parishes Act, 1876, s. 35; Removal Act, 11 & 12 Vict., c. 111*.—A child after living in the A. union with its father, who had acquired a settlement there by residence, removed with him into the X. union, and while residing with him there attained the age of sixteen, and became chargeable to the union. After the father had resided a year in the X. union, and so became irremovable, held, that the child was also irremovable.—*Mitford Guardians v. Wayland Guardians*, L.R. 24 Q.B.D. 122.

Power:—

- (vii.) **Ch. D.**—*Exercise of Power by two Donees—Power of Revocation reserved to one—Validity*.—A power of appointment “with or without power of revocation” was reserved to two donees. The two exercised the power, reserving a power of revocation to one only of the two. Held, that such reservation was invalid.—*Burnaby v. Baillie*, L.R. 42 Ch. D. 282; 58 L.J. Ch. 842; 61 L.T. 634; 38 W.R. 125.
- (viii.) **C. A.**—*Fraud on—Restitution to Objects—Extent of Liability*.—Decision of Ch. D. (see Vol. 14, p. 117, iv.) affirmed.—*Bridger v. Deane*, 61 L.T. 492.
See Will, p. 68, iii., iv.

Practice:—

- (ix.) **Q. B. D.**—*Amendment—Defence of Statute of Limitations Defeated*.—The plaintiff, the assignee of a debt due from the defendant, issued a writ in his own name, against the defendant, without having given him

notice of the assignment. He afterwards applied to amend his writ by adding the assignor as plaintiff. Between the date of the writ and that of the application to amend the Statute of Limitations had barred the remedy. *Held*, that the amendment ought not to be allowed, as it would take away a defence which had accrued to the defendant.—*Hudson v. Fernyhough*, 61 L.T. 722.

- (i.) **C. A.—Amendment of Pleading**—*R.S.C.*, 1883, *O. xxviii.*, *r. 1.*—Decision of Ch. D. (see Vol. 15, p. 14, v.) affirmed.—*Ederain v. Cohen*, 38 W.R. 177.
- (ii.) **C. A.—Appeal—Papers for use of Court**.—On the hearing of an appeal which involves the construction of documents, the appellant must supply the Court with three copies of each material document, the costs of which will be allowed. Where the appellant failed to do so, the appeal was ordered to stand over, the costs of the adjournment to be paid by the appellant.—*Cannot v. Oppenheim*, 38 W.R. 1.
- (iii.) **P. C.—Appeal—Special Leave—Question of Law—Argument**.—A person who has obtained special leave to appeal on the representation that he desires to raise a question of law of great and general importance, will not be allowed at the hearing to say that no such question arises, and to argue that the case turns on a question of fact wrongly decided in the Court below.—*St. John's (Corporation) v. Central Vermont Railway*, L.R. 14 App. Cas. 590; 59 L.J. P.C. 15; 61 L.T. 441.
- (iv.) **P. C.—Appeal—Special Leave**.—Although a case may be of a substantial character and may involve matter of great public interest, and may raise an important question of law, yet the judgment sought to be appealed against may be plainly right or unattended with sufficient doubt to justify special leave being granted.—*Cité de Montréal v. Eclesiastiques du Séminaire de St. Sulpice*, L.R. 14 App. Cas. 660; 59 L.J. P.C. 20; 61 L.T. 653.
- (v.) **C. A.—Appeal—Time—Final or Interlocutory Order**.—An appeal by a plaintiff from a judgment dismissing his action having been dismissed with costs, the plaintiff moved for liberty to set off against the costs payable to the defendant L. under that order certain costs payable by him to the plaintiff partly in that action and partly in another action. G. claimed a lien on these costs as L.'s solicitor in the other action. The judge allowed the set-off, subject, as regards the costs in the other action, to any lien which G. could make out before the Taxing Master. G. appealed. *Held*, that the order was for working out the rights given by a final judgment, and was therefore interlocutory.—*Blakey v. Latham*, L.R. 43 Ch. D. 23; 38 W.R. 198.
- (vi.) **Q. B. D.—Attachment of Debts—Insolvent Estate—Dividend in Hands of Official Receiver—Garnishee Order**—*R.S.C.*, 1883, *O. xlv.*, *r. 1.*—A sum of money in the hands of the Official Receiver to be paid to a creditor of a deceased person's insolvent estate which is being administered in bankruptcy, is not a debt which can be attached by an order of the Court as a debt due to a judgment creditor of such insolvent estate.—*Prout v. Gregory*, 61 L.T. 696; 38 W.R. 204.
- (vii.) **Q. B. D.—Compensation for Lands Injuriously Affected—Order in Chambers to Try Case by Judge—Jurisdiction—Regulation of Railways Act, 1868, s. 41**.—In a claim under the Lands Clauses Act for compensation for injuriously affecting lands, there is no jurisdiction in chambers to order that the case should be tried before a judge alone.—*E. p. Oliver, in re East London Railway*, 61 L.T. 723.

(i.) **Q. B. D.**—*County Court—Costs—Particulars—Solicitor's Signature—Costs—County Court Rules, 1889, O. vi., r. 10, & Appendix.*—Where the particulars indorsed on an ordinary county court summons bore a lithographed indorsement of a solicitor's name and address, but were not otherwise signed by him, held, that they were not "signed" so as to entitle the plaintiff to recover from the defendant the costs of the particulars.—*Reg. v. Couper*, L.R. 24 Q.B.D. 60; 59 L.J. Q.B. 26; 38 W.R. 207.

(ii.) **Q. B. D.**—*County Court—Scotch Firm—Branch Office in Jurisdiction—Service—Irregularity—Waiver—County Courts Act, 1888, s. 74.*—A Scotch firm carrying on business in Scotland with a branch office at

good, and that it had been that it was a mere irregularity which might be waived by the conduct of the defendants.—*Weatherley Calder*, 61 L.T. 508.

(iii.) **Q. B. D.**—*Costs—Action Founded on Contract—Recovery of Less than £50—Discretion—Appeal—County Courts Act, 1888, s. 116.*—In an action founded on contract where the plaintiff recovers less than £50 a judge in chambers has a discretion to allow costs on the High Court scale, and such discretion is not subject to appeal.—*Bazett v. Morgan*, L.R. 24 Q.B.D. 48; 61 L.T. 434; 38 W.R. 108.

(iv.) **P. D.**—*Divorce—Counter-charge of Adultery—No Counter-claim for Divorce—Intervention of Alleged Adulterer—Divorce Act, 1857, s. 28—Matrimonial Causes Act, 1866, s. 2.*—The wife petitioned for divorce on the ground of cruelty and adultery. The husband alleged that the wife had committed adultery with R., and prayed for a dismissal of the petition and for further relief, but did not claim a divorce. Held, that R. should be allowed to intervene and file a plea in answer to the respondent's counter-charge.—*Wheeler v. Wheeler*, L.R. 14 P.D. 154; 58 L.J. P. 65; 61 L.T. 306.

(v.) **P. D.**—*Divorce—Separate Property—Dispute as to Articles—Registrar—Jurisdiction.*—A registrar has no jurisdiction to entertain a summons under the 17th Section of the Married Women's Property Act, 1882. If a matter has been referred to the registrar in the terms of that section, his duty is to enquire into the merits of the respective claims of the husband and wife, and report to the judge.—*Wood v. Wood*, L.R. 14 P.D. 157; 58 L.J. P. 68; 61 L.T. 338; 38 W.R. 208.

(vi.) **P. D.**—*Divorce Suit—Substituted Service.*—Order for substituted service of a divorce petition and citation on the husband of the petitioner by registered letter: the service not to be considered as complete until the Court should be satisfied that the letter had been actually received by him.—*Cox v. Cox*, L.T. 698.

(vii.) **Ch. D.**—*Equitable Execution—Petition for Sale of Interest in Land—Judgment Law Amendment Act, 1864, ss. 4, 5.*—A judgment creditor, having obtained the appointment of a receiver of the debtor's interest in land subject to a legal mortgage, petitioned for the sale of such interest. An order for sale was made on evidence that the mortgagee had received no notice of any incumbrance, and that searches had been made by the petitioner's solicitor, who had found that no execution or process affecting the land had been registered, and that no bankruptcy petition had been presented, or receiving order made, against the debtor.—*In re Bithray*; 59 L.J. Ch. 66; 61 L.T. 888; 38 W.R. 60.

- (i.) **C. A.—Equitable Execution—Receiver—Deceased Debtor—R.S.C., 1883, O. xvii., rr. 1, 4; O. xlii., rr. 8, 23, 28.**—The appointment of a receiver of the interest of a judgment debtor in real estate, is not a mere form of execution, but in relief, obtainable only by an order of the Court, based on the fact that execution, properly so called, cannot be had. Therefore, after the death of a judgment debtor, the Court has no jurisdiction on the *ex parte* application of the judgment creditor, to appoint a receiver of the interest of the deceased judgment debtor in real estate, when the person on whom such real estate has devolved is not a party to the proceedings.—*Atkins v. Shephard*, 38 W.R. 133.
- (ii.) **Q. B. D.—Garnishee—Attachable Debt—Unsigned Judgment—Judgment against Separate Estate—R.S.C., 1883, O. xlv., r. 1.**—When the judge at a trial has ordered that judgment should be entered for a certain amount, there is a debt “owing or accruing” to the person in whose favour judgment is pronounced, which can be attached under garnishee proceedings, although such person has not caused the judgment to be entered or signed. A judgment against a married woman, enforceable only against personal property to her separate use which she was not restrained from anticipating is a judgment which entitles the judgment creditor to institute garnishee proceedings, and to attach a debt owing or accruing to such married woman.—*Holtby v. Hodgson*, L.R. 24 Q.B.D. 103; 61 L.T. 297; 38 W.R. 68.
- (iii.) **Q. B. D.—Interpleader—R.S.C., 1883, O. lvii., rr. 1(a), 7.**—Where a claimant is substituted as defendant “in lieu of” the original defendant there is no power to limit such claimant to the defences which the original defendant could have set up.—*Gerhard v. Montague*, 61 L.T. 561; 38 W.R. 76.
- (iv.) **Ch. D.—Married Woman—Separate Property—Judgment—Costs—Restraint on Anticipation—Married Women’s Property Act, 1882, s. 1, sub-s. 2.**—An order with costs against a married woman, suing or sued under the Married Women’s Property Act, 1882, must provide that the costs are to be payable “out of her separate property and not otherwise,” and must limit execution to her separate property not subject to any restraint on anticipation. Money in the hands of a trustee for a married woman in respect of her separate estate subject to a restraint on anticipation, which has accrued due subsequently to a judgment against her, is not liable to attachment by the judgment creditor.—*Galmoye v. Cowan*, 58 L.J. Ch. 769.
- (v.) **C. A.—New Trial—Excessive Damages.**—In an action for libel a new trial ought not to be granted on the ground of excessive damages, unless the damages are so large that the Court considers that no twelve reasonable men could have given them.—*Praed v. Graham*, L.R. 24 Q.B.D. 53; 38 W.R. 103.
- (vi.) **C. A.—Originating Summons—Jurisdiction—R.S.C., 1883, O. iv., r. 3 (g).**—The Court has no jurisdiction on an originating summons to determine any question or matter which could not have been determined in an action for the administration of the estate or trust, and refused to decide on such a summons, whether a sum of money belonged to a testator’s estate or had been given by the testator to his wife during his life time.—*Royle v. Hayes*, L.R. 43 Ch. D. 18; 59 L.J. Ch. 1; 61 L.T. 542; 38 W.R. 17.
- (vii.) **Ch. D.—Originating Summons—New Trustee—Appointment—Vesting Order—Trustees Act, 1850, s. 43.**—An originating summons was issued for the appointment of a new trustee and a vesting order. Held, that the Court had power on motion to make an order vesting the trust

property in the new trustee, with the right to call for a transfer of stock in the Bank of England.—*Re Jones*, 61 L.T. 554; 38 W.R. 208.

(i.) **Ch. D.—Parties—Trustee Representing Beneficiaries—R.S.C., 1888, O. xvi., r. 8.**—For the purposes of a foreclosure action, the trustee of a mortgage which it is sought to foreclose does not sufficiently represent the interests of persons beneficially interested in the mortgage money, and they must be added as parties.—*Francis v. Harrison*, 61 L.T. 667.

(ii.) **Ch. D.—Partition—Request for Sale—Inquiry—Order at Trial.**—As a general rule, where in a partition action parties claiming to be owners of a moiety of the property request a sale, an inquiry will be directed to ascertain the persons interested. But in simple cases, where the value of the property is small, the Court may order an immediate sale at the trial, upon being satisfied as to the persons interested.—*Wood v. Gregory*, L.R. 43 Ch. D. 82; 38 W.R. 226.

(iii.) **Ch. D.—Partition—Sale—Title—Inquiry—Infants—Evidence—R.S.C., 1888, O. li., r. 1 (a)—R.S.C., 1888, r. 9.**—On motion for judgment in an action for sale in lieu of partition, where all persons interested (some being infants), asked for an immediate sale by auction out of Court, and that an inquiry as to title might be dispensed with, an order was made for an immediate sale by auction out of Court, subject to directions in chambers, for fixing a reserve price and the auctioneer's remuneration, the conditions of sale to require the purchase moneys to be paid into Court. Having regard to the fact that infants were interested, the allegations in the statement of claim were required to be verified by affidavit, although admitted by the defendant in his pleading.—*Willis v. Willis*, 61 L.T. 610; 38 W.R. 7.

(iv.) **Ch. D.—Patent—Statement of Claim—Particulars of Breaches.**—The statement of claim in an action for infringement stated "particulars of breaches are delivered herewith." Held, that the particulars formed part of the statement of claim for the purpose of a motion for judgment in default of appearance by the defendant.—*United Telephone Co. v. Smith; Same v. Mitchell*, 61 L.T. 617; 38 W.R. 70.

(v.) **C. A.—Pleading—Time for—Peremptory Order—Subsequent Order for Particulars—R.S.C., 1888, O. xix., r. 8.**—On an application by a defendant for an extension of time for pleading, the master gave him a "month peremptory" to plead. The defendant subsequently obtained on summons an order for particulars of the plaintiff's claim, which were delivered twelve days after the return of the summons. Held, that the time allowed for pleading was not suspended during such twelve days, and that in default of pleading by the defendant the plaintiff was entitled to sign judgment one month after the peremptory order, unless such order was expressly altered.—*Falck v. Arthelm*, 38 W.R. 196.

(vi.) **Q. B. D.—Prohibition—Application in Chambers—R.S.C., 1888, O. lix., r. 8 (a)—Costs—County Court Rules, 1889, O. 1, r. 20—County Courts Act, 1888, ss. 119 & 164.**—An application for a prohibition to a County Court may be made in chambers as well during sittings as in vacation. Rule 20 of Order 1 of the County Court Rules, 1889, is not *ultra vires*.—*King v. Charing Cross Bank*, L.R. 24 Q.B.D. 27; 59 L.J. Q.B. 24. —

(vii.) **Q. B. D.—Second Suit for Same Matter—Costs of First Unpaid—Stay of Proceedings—Forma Pauperis.**—A plaintiff, having failed in his action, commenced a second action for the same cause, the costs of the first being unpaid. Held, that proceedings ought to be stayed till the costs of the first action were paid; and that the judge had exercised his discretion rightly in refusing leave to sue in *forma pauperis*.—*McCabe v. Bank of Ireland*, L.R. 14 App. Cas. 413; 59 L.J. P.C. 18; 61 L.T. 416. —

- (i.) **C. A.—Stay of Proceedings—Pending Appeal—Discretion**—*R.S.C., 1883, O. lviii., r. 16.*—There is, and can be, no practice limiting the absolute discretion of the Court to grant or refuse a stay of proceedings pending an appeal.—*A. G. v. Emerson*, L.R. 24 Q.B.D. 58; 38 W.R. 102.
- (ii.) **Ch. D.—Sequestration—Death of Contemnor—Administration Action**—A writ of sequestration was issued to compel the performance of a duty, and the sequestrators obtained an order for sale of the contemnor's chattels, but before sale the contemnor died. An order was made continuing the sequestration proceedings against his legal personal representatives. A creditor having obtained an order for the administration of the contemnor's estate, which was alleged to be insolvent, and was not proved to be solvent, held, that the death of the contemnor was no ground for restraining the sequestrators from selling.—*Pratt v. Inman*, 38 W.R. 200.
- (iii.) **Ch. D.—Striking out Statement of Claim—Two Causes of Action**—*R.S.C., 1883, O. xxv., r. 4—Trial of Question of Law—R.C.S., 1883, O. xxxiv., r. 2.*—A statement of claim contained two causes of action. The defendant paid into Court the sum claimed in respect of one cause of action, and moved to strike out the statement of claim as disclosing no reasonable ground of action. Motion refused, on the ground that the defendant had admitted that the statement of claim contained a reasonable ground of action. Where a defendant admitted facts in such a way as to leave it open to him to raise defences on the facts which might make the decision of a certain question of law unnecessary, held, that the Court would not, on the defendant's motion, allow such question of law to be decided before the issues of fact. *Sembler*, the Court would have tried such question of law if the only disputes as to fact had been such as to allow it to be raised in an alternative form, so that if both alternatives had been decided in the affirmative or negative the action would have been disposed of, and if one alternative had been decided one way and the other the other, nothing but a simple and definite issue of fact would have remained.—*Grosvenor v. White*, 61 L.T. 663; 38 W.R. 201.
- (iv.) **H. L.—Striking out Defence—Abuse of Procedure**—Where a defendant by his statement of defence sets up exactly the same case as he had previously set up unsuccessfully as plaintiff in an action, held, that there was an inherent jurisdiction in the Court to strike out the statement of defence as frivolous and vexatious, and an abuse of the procedure, and to give judgment for the plaintiff as claimed.—*Reichel v. Magrath*, L.R. 14 App. Cas. 665.
- (v.) **P. D.—Restitution of Conjugal Rights—Written Demand—Substituted Service**—Substituted service of the written demand for cohabitation prior to institution of proceedings for the restitution of conjugal rights was ordered, the Court being satisfied that the address of the proposed respondent was being wilfully withheld from the intending petitioner.—*In re McArthur's Petition*, 58 L.J. P. 70; 61 L.T. 308.
- (vi.) **Ch. D.—Summons—Setting Aside Compromise**—There is no jurisdiction to set aside the compromise of an action on a summons in the compromised action. The relief must be sought by a separate action.—*Emiris v. Woodward*, 61 L.T. 666.
- (vii.) **Ch. D.—Third Party—Procedure—Right to Intervene—Costs**—Where a third party notice has been given, and the third party has entered an appearance, he has a right to intervene, though no directions have been obtained or applied for, beyond an order that the question between the defendant and the third party be tried as soon as possible after the trial of the original action. Where the plaintiff succeeds against the

defendant, who succeeds against the third party, but is shewn to have defended the action for his own benefit, he must bear the costs of the original action to the exoneration of the third party.—*Blors v. Ashby*, L.R. 42 Ch. D. 682; 58 L.J. Ch. 779; 38 W.R. 141.

- (i.) **C. A.**—*Third Party—Appeal*.—*Notice to*.—A third party who has been served by the defendant with notice, and has obtained leave to appear at the trial, is not a person directly affected by an appeal by the plaintiff, and need not be served by the plaintiff with notice of the appeal; but the defendant, if he desires him to be served, must obtain the leave of the Court to serve him.—*Priest v. Upplaby*, L.R. 42 Ch. D. 35; 38 W.R. 150.
- (ii.) **C. A.**—*Trial—Jury—Chancery Division*.—If a plaintiff who has brought an action in the Chancery Division desires afterwards to have it tried by a jury, the onus is on him to shew some reason why it should not be tried in the manner in which it would, in the ordinary course, be tried in the Chancery Division. If he fails to show such reason his application for trial by jury will be refused.—*A.G. v. Vigner*, 38 W.R. 194.
- (iii.) **Q. B. D.**—*Trial—Mode of—Referee—Scientific Evidence*.—In an action for total loss the question was whether a twist in a ship was congenital or caused by perils of the sea. Evidence taken on commission amounted to 300 pages, and six scientific witnesses were to be called. Held, that it was not a case for trial before referees.—*Hamilton v. Merchants' Marine Insurance Co.*, 58 L.J. Q.B. 544.
- (iv.) **Ch. D.**—*Vesting Order—Stock in Names of Infants and Others—Right to Transfer—Trustee Act, 1850, s. 2—Trustee Extension Act, 1852, s. 3*.—Infants were entitled under a will to legacies, which had been invested in consols in the names of the executors, and of the infant in each case entitled thereto. Held, that the Court would make an order vesting in the executors the right to transfer the stock, and to receive the dividends accrued prior to the transfer.—*Foster v. Barnett*, 61 L.T. 676.
- (v.) **Q. B. D.**—*County Court—Transfer of Action—Payment into Court—Time—County Court Rules, 1889, O. ix., r. 11 (1)*.—An action was brought in a County Court, the return day being April 12th. It was transferred, on April 1st, to another County Court, where the return day was April 15th. The defendant paid money into Court on April 8th. Held, that the return day was April 15th, and that the payment was made five clear days before the return day.—*Stevens v. Hounslow Burial Board*, 38 W.R. 236.

Promissory Note :—

- (vi.) **C. A.**—*Discharge—Indorsement—Holder for Value*.—The defendant gave W. a promissory note as security for a debt. He afterwards gave W. a collateral security for the same debt, which W. transferred for value. W. afterwards indorsed the promissory note to the plaintiff, who had no notice of the collateral security, to secure a debt due from W. to the plaintiff. Held, that the note was not discharged, and that the plaintiff was a *bond fide* holder for value, entitled to sue the defendant on it.—*Glasscock v. Balls*, L.R. 24 Q.B.D. 18; 38 W.R. 155.

Railway :—

- (vii.) **Q. B. D.**—*Compensation—Lands Clauses Act, 1845, s. 68—Railways Clauses Act, 1845, ss. 6, 16—Obstruction of Light*.—The claimant, owner of a building with ancient lights, pulled it down and rebuilt it. The new lights partly coincided with the old lights, but were larger. The

company, in exercise of their powers, erected a building which obstructed the lights, before a right to access of light to the new parts of the lights had been acquired. *Held*, that the measure of the right to compensation was not the damages which could be recovered by action, and that the claimant was entitled to compensation for both new and old lights.—*In re Arbitration between the London, Tilbury and Southend Railway Co. and Trustees of Gower's Walk Schools*, L.R. 24 Q.B.D. 40; 61 L.T. 699.

(i.) **H. L.**—*Highway—Bridge—Liability to Repair—Railways Clauses Act, 1845, s. 46.*—Where a highway is carried over a railway on a bridge, the railway company is bound to repair the roadway as well as the structure of the bridge.—*L & Y.R. v. Mayor of Bury*, L.R. 14 App. Cas. 417; 61 L.T. 417.

Restraint of Trade:—

(ii.) **C. A.**—*Prohibition Against Carrying on Particular Business—Extent of.*—The plaintiff carried on the business of "ladies' outfitting" on premises held under a lease by which the lessor covenanted not to consent to the business of "ladies' outfitting" being carried on on the adjoining premises, which belonged to him. The defendant took the adjoining premises with notice of the covenant, and there carried on the business of "fancy drapers and hosiers," in the course of which he sold some articles, the sale of which was part of the business of "ladies' outfitting." *Held*, that the covenant in the lease did not forbid the sale of any specific article sold in the course of a "ladies' outfitting" business, and that, assuming that the defendant was bound by the covenant, he could not be restrained from selling such articles.—*Stuart v. Diplock*, 38 W.R. 223.

Revenue:—

(iii.) **C. A.**—*Contract for Sale of Goodwill—Stamp.*—Decision of Q. B. D. (see Vol. 14, p. 125, v.) affirmed.—*Commissioners of Inland Revenue v. Lewis; Same v. Angus*, L.R. 23 Q.B.D. 579; 38 W.R. 3.

River:—

(iv.) **Ch. D.**—*"Navigable"—Tide.*—The legal and technical meaning of the word "navigable" requires not only that navigation should be possible, but also that there should be ebb and flow of the tide. Land may properly be said to be covered with "navigable" water, although for short periods it is left dry. But where such land is dry for days together the water is not "navigable,"—*Earl of Ilchester v. Raishleigh*, 61 L.T. 477; 38 W.R. 104.

(v.) **Ch. D.**—*Right of Way—Boating—Dedication.*—The defendant claimed that a part of a river was a public highway. The evidence shewed that the part in question was not tidal; that it could not be approached by boats from below; that its depth was artificial, and depended on mill dams; that it had never been used for purposes of commerce, or as a way from one public place to another; that there was no public access to it at one end, and that it was doubtful whether there was any public access for boats at any point; that no one except the mill owners had done anything towards maintaining it as a waterway; that there had been a considerable amount of boating on it by riparian owners, and by others in boats brought from a distance, chiefly for fishing, and that persons boating had hardly ever been interfered with. *Held*, that the user had been permissive, and that no public rights had been established.—*Bourke v. Davis*, 38 W.R. 167.

Sale of Coals:—

(i.) **C. A.—Method of Weighing—Action for Penalty.**—Decision of Q. B. D. (see Vol. 15, p. 20, i.) affirmed.—*Smith v. Wood*, L.R. 24 Q.B.D. 23; 59 L.J. Q.B. 5; 38 W.R. 138.

Settled Land:—

(ii.) **Ch. D.—Different Estates—Same Tenant for Life—Application of Capital Moneys—Costs—Discretion of Tenant for Life—Settled Land Act, 1882, ss. 2, 5, 20, 21, 24, 26, 53.**—The discretion of the tenant for life as to the application of capital moneys, with a due regard for the interests of all parties, ought, in a question of doubt, to prevail if fairly exercised. Estates A., B., C. and D. were devised to the same tenant for life. After her death estates A., B., and C. were devised to different persons in strict settlement, and a long term of years was created in estate D. for the purpose of paying off incumbrances on the other estates in the order in which they were devised, subject to which one moiety of estate D. was devised to the uses of estate A., and the other to the uses of estate B. Held, that estate B. and one moiety of D. were one settled estate, and that capital moneys arising from one moiety of D. might be applied for improvements on B., it appearing that such application would not endanger, though it might delay, the payment of the incumbrances on the other estates. Held also, that the costs, as between solicitor and client, of the solicitor and surveyor of the tenant for life for preparing and carrying out the necessary schemes for such improvements, were costs incidental to the application and payable out of capital moneys.—*In re Lord Stamford's Settled Estates*, L.R. 43 Ch. D. 84; 58 L.J. Ch. 849; 61 L.T. 504.

Settlement:—

(iii.) **Ch. D.—After-acquired Property—Property Falling into Possession after Coverture.**—By marriage settlement the husband covenanted to settle any property to which the wife, or himself in her right, should subsequently become entitled. She was then entitled to property in remainder, subject to certain life interests. The wife died before the life interests fell in. Held, on such life interests falling in, that the husband's covenant was not confined to property falling into possession during the coverture.—*Fisher v. Shirley*, 59 L.J. Ch. 29; 61 L.T. 668; 38 W.R. 70.

(iv.) **Ch. D.—Construction—Power to Raise Sum of Money if there should not be more than two Children—No Children.**—A marriage settlement required the trustees, at the request of the survivor of the husband and wife, to raise, "if there should not be more than two children of the marriage, the sum of £5,000, and if there should be more than two children, the sum of £3,000." There were no children. Held, that £5,000 was raisable at the request of the survivor.—*Wilkinson v. Thornhill*, 61 L.T. 362.

(v.) **Ch. D.—Doubt—Family Arrangement.**—In 1834 a domiciled Englishman married in Turkey a domiciled Sicilian. By a contract before marriage he gave half of all his revenues and real and personal estate as an irrevocable donation in augmentation of her dowry. Nothing was done to carry out the contract. By Sicilian law, if the husband's land had been in Sicily, half of it would have been transferred to the wife without further conveyance, which half would have been inalienable during their joint lives, and the contract would have been irrevocable. In 1846 the husband disentailed his land and sold part, and in 1847 he and his wife executed a deed, by which, after reciting that doubts had

arisen as to the effect of the contract, the rest of the property was settled. In 1886 the husband and wife by deed purported to annul the deed of 1847. After the husband's death, the tenant in tail under the deed of 1847 claimed that the trusts thereof should be executed, and the widow contended that the land comprised in the contract was inalienable, and that a capacity to alienate could not be obtained by arrangement. Held, that in 1847 there was a serious doubt as to the rights of the parties, and that the deed then executed was a family arrangement which ought not to be disturbed after the time which had elapsed.—*Case v. Case*, 38 W.R. 183.

Sewers Rates:—

(i.) **Q. B. D.**—*Distress Warrant—Execution of—Delegation*—12 & 13 Vict., c. 50, s. 7.—A warrant of distress for sewers rates can only be lawfully executed by the person named therein, and if executed by another person, such other person is guilty of trespass, and if he commits an assault in executing it he may be convicted thereof.—*Symonds v. Kurts*, 61 L.T. 559.

Ship:—

(ii.) **Q.B.D.**—*Charter-party—Guarantees of Capacity*.—A charter-party provided that a ship should "load a cargo of creosoted sleepers and timber," and contained the following clauses: "Charterer has option of shipping 100 to 200 tons of general cargo;" and "owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo." Held, that the latter clause was a warranty of the carrying capacity of the ship, and not a warranty that she could carry about 90,000 cubic feet of the description of cargo which the charterer was entitled to tender.—*Carnegie v. Conner*, L.R. 24 Q.B.D. 45; 61 L.T. 691.

(iii.) **Q. B. D.**—*Charter-party—Demurrage—Cesser Clause—Colliery Guarantee*.—The plaintiffs chartered their vessel to the defendants to load a cargo of coals. The charter-party provided that the vessel was to be loaded in 108 working hours, "subject to the colliery guarantee." There was no provision for demurrage at the port of loading. The charterers' liability was to cease on the cargo being loaded and the advance freight paid, the owners having a lien on the cargo for the balance of freight and demurrage. By a colliery guarantee the colliery owners undertook to load the vessel in 108 hours, with demurrage at the rate of 20s. per hour. The vessel was not loaded in 108 hours. The plaintiffs sued for demurrage, or for damages for unreasonably detaining the vessel at the port of loading. Held, that the shipowners could not sue the charterers on the colliery guarantee unless it was incorporated in the charter-party, in which case the clause of cesser applied, and discharged the charterers; but that by the custom of the trade the ship-owners could sue the colliery owners on the guarantee.—*The Restitution Steamship Co. v. Sir John Pirie & Co.*, 61 L.T. 330.

(iv.) **Q. B. D.**—*Charter-party—Demurrage—Completion of Voyage*.—A charter-party provided that the ship should go to Odessa, or as near thereto as she could safely get, and there load. Twelve running days were allowed for loading and unloading. She arrived in the outer harbour of Odessa on December 22nd, but was not allowed to go to a loading quay berth, as the docks were full. Held, that the voyage was completed when the vessel arrived in the outer harbour, and that the running days were to be counted from that date.—*In re Arbitration between Fyman & Co. and Dreyfus and Co.*, 59 L.J. Q.B. 18; 61 L.T. 724.

- (i.) **Q. B. D.—Demurrage—Consignee Acting as Agent.**—Consignees under a bill of lading which made the goods deliverable to them "paying freight and all other conditions as per charter-party," refused to pay demurrage incurred at the port of loading and due under the charter-party, but accepted delivery of the goods. They were known to the ship-owners to be acting as agents. In an action by the shipowners for demurrage, held, that the consignees were not liable. — *Steamship "County of Lancaster"* v. *Sharpe*, 59 L.J. Q.B. 22; 61 L.T. 692.
- (ii.) **C. A.—Collision—Fog.**—There is no rule of navigation which forbids a ship to alter her helm in a fog.—*The Vindomora*, L.R. 14 P.D. 172; 61 L.T. 655; 38 W.R. 69.
- (iii.) **H. L.—Collision—Fog—Regulations of 1884, Art. 18.**—Where two steamships, invisible to each other by reason of fog, gradually draw near until they are a few ships' length apart, they both ought to stop and reverse; unless the fog-signals of one of the vessels show without doubt that she is so steered as to pass clear without risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse.—*Owners of the "Lebanon"* v. *Owners of the "Ceto"*, L.R. 14 App. Cas. 670.
- (iv.) **C. A.—Collision—Sailing-ships—Close-Hauled—Luffing.**—Decision of P. D. (see Vol. 14, p. 127, iv.) affirmed.—*The Earl Wemyss*, 61 L.T. 289.
- (v.) **H. L.—Collision—Consequential Damages—Agreement for Employment.**—Decision of C. A. (see Vol. 14, p. 52, iii.) affirmed.—*The Argentino*, L.R. 14 App. Cas. 519; 61 L.T. 706.
- (vi.) **C. A.—Grounding of Vessel—Liability of Dockowners.**—Decision of P. D. (see Vol. 14, p. 92, iii.) affirmed.—*The Apollo*, 61 L.T. 286.
- (vii.) **P. C.—General Average—Jettison—Wrongdoer.**—When a ship is stranded through the negligence of the master and jettison becomes necessary, each owner of jettisoned cargo is entitled to general average, but the shipowners, the negligence of whose agent has caused the loss, are not so entitled. In a proper case of jettison each owner of jettisoned goods becomes a creditor of the ship and cargo salved, and has a direct claim against each owner of ship and cargo for a *pro rata* contribution, which he can recover either by direct action or by enforcing through the master a lien on each parcel of goods salved to answer its proportionate liability. — *Strang* v. *Scott*, L.R. 14 App. Cas. 601; 59 L.J. P.C. 1; 61 L.T. 597.
- (viii.) **Q. B. D.—Insurance—Mutual Society—Double Insurance—Mortgage.**—The rules of the defendants, a mutual marine insurance society, provided that vessels should not be insured for more than three-fourths of their value, and that "if any member insures or attempt to insure elsewhere any ship, share or shares in any ship already insured in the society, he shall be liable to immediate expulsion, and to forfeiture of any claim or demand he may have against the society." The rules also provided that if any member should become aware that any vessel insured by the society was mortgaged, he should give notice thereof to the directors, and in default of such notice that the member in whose name the insurance is registered should forfeit all claims in the society to the extent of the mortgage. P. insured the B., on behalf of the owners, in the defendant society for £600. The B. was to the knowledge of the defendants insured with another society for £300, which sum, together with the £600, made up more than three-fourths of the value. The B. was afterwards mortgaged by the owners for £300, of which P. became aware, but did not give notice to the defendants. Held, on B. becoming a total loss, that the defendants were estopped from relying on the rule.

as to double insurance, but that they were entitled to deduct the amount of the mortgage from the amount payable under the policy.—*Jones v. Bangor Mutual Shipping Insurance Society*, 61 L.T. 727.

- (i.) **Ch. D.—Maritime Lien—Towage Services.**—Towage service is not the subject of maritime lien; therefore, in the liquidation of a steam carrying company, and in a debenture-holder's action, held, that the owners of steam-tugs were not entitled to a lien on the company's vessels for services rendered by the tugs in towing such vessels into and out of harbour.—*Westrup v. Great Yarmouth Steam Carrying Co.*, 61 L.T. 714.
- (ii.) **P. D.—Thames Bye-Laws—Arts. 24 & 25—Crossing River.**—When a vessel lying at anchor in the Thames head to tide is about to proceed up or down with the tide, and has to work across the river in turning, she is a "crossing" vessel, and must keep out of the way of vessels going up or down, which latter vessels must keep their course.—*The Schwan*, 61 L.T. 308.

Solicitor:—

- (iii.) **C. A.—Costs—Lien—Limitations.**—M. had acted for many years as solicitor for C. C. changed his solicitor, and on an originating summons against M. obtained an order that he should deliver a bill of his fees and disbursements, with a reference to the taxing master to tax the said bill, and an order for payment of the amount found due on taxation. And it was ordered that C. should pay a sum into Court, and that M. should deliver up all C.'s documents, and that his lien on the documents should attach on the sum paid into court. Held, that the taxing master ought to tax all the items in the bill whether statute barred or not, the object being to obtain delivery of C.'s documents, and for that purpose to ascertain the amount of M.'s lien.—*Curwen v. Milburn*, L.R. 42 Ch. D. 424; 38 W.R. 49.
- (iv.) **Ch. D.—Costs—Solicitor Lending on Mortgage.**—A solicitor who advances money to a client on mortgage is not entitled to charge profit-costs for the preparation of the mortgage deed.—*E. p. Evans; in re Roberts*, 59 L.J. Ch. 25; 38 W.R. 225.
- (v.) **P. D.—Costs—Taxation—Death of Client—Subsequent Costs.**—Costs incurred by a solicitor after the death of his client were disallowed on taxation, notwithstanding that the fact of the death was not, and could not be, known to the solicitor when he incurred the costs.—*Pool v. Pool*, 58 L.J. P. 67; 61 L.T. 401.
- (vi.) **Ch. D.—Taxation—Petition of Course—Delivery of Bill.**—The allegation, in a petition of course for taxation, that the solicitor has delivered his bill to the petitioner, is a material one, and is not satisfied by a constructive delivery. Therefore where a client instructed a solicitor, A., to do certain work, and A. employed B., another solicitor, to do the work, the delivery of B.'s bill to A., who sent it on to the client, is not such a delivery to the client as to entitle the client to taxation on a petition of course.—*In re Robertson*, L.R. 42 Ch. D. 553; 58 L.J. Ch. 632; 38 W.R. 170.
- (vii.) **Q. B. D.—Witness in Bankruptcy—Allowance to—Bankruptcy Rules, 1886, r. 71.**—A solicitor has a right of action for the allowance sanctioned by statute for expenses and loss of time on being summoned as a witness in bankruptcy proceedings.—*Chamberlain v. Stoneham*, L.R. 24 Q.B.D. 113; 61 L.T. 560; 38 W.R. 107.

Trade Mark:—

- (i.) **Ch. D.—Patents, &c., Act, 1883, s. 64 (1) (c) & (2), s. 74 (1) (b) (2) (3), s. 90—“Distinctive”—“Common to the Trade.”**—In registering a trade mark any part of which consists of a word which, though *prima facie* “distinctive,” is in reality “common to the trade,” such word must be disclaimed. “Common to the trade” means “open to the trade to use,” and the phrase is not limited or defined as “publicly used by more than three persons.” “Washerine” applied to a preparation for laundry purposes is such a word.—*Burland v. Broxburn Oil Co.*, L.R. 42 Ch. D. 274; 58 L.J. Ch. 816; 61 L.T. 618; 38 W.R. 89.
- (ii.) **Ch. D.—Registration—Disclaimer of Common Particular—Calculated to Deceive—Patents, &c., Act, 1883, s. 72 (2), s. 74 (2).**—A disclaimer of the exclusive right to use a common particular must be made in the application for registration. An application to register a mark consisting of a heart with a number of words including “Parchment Bank,” the whole inclosed in a rectangle, was rejected on the ground of resemblance calculated to deceive, there being on the register in the same class a mark consisting of the words “Pirie’s Parchment Bank.”—*In re Goodall’s Trade Mark*, L.R. 42 Ch. D. 566; 38 W.R. 189.
- (iii.) **Ch. D.—Registration—Pattern or Design—Rectification.**—In 1884 M. registered the word “Albion” as a trade mark, which he had used since 1873. In 1889 W. proved that prior to August, 1875, M. had used the word not as a trade mark, but as designating the pattern or design of his goods. *Held*, that the mark must be expunged from the register.—*In re McGregor & Co.’s Trade Mark*, L.R. 42 Ch. D. 691; 59 L.J. Ch. 22; 61 L.T. 481.
- (iv.) **Ch. D.—Register—Rectification—Burden of Proof—Trade Marks Registration Act, 1875, s. 10.**—Where application is made to rectify the register by expunging a trade mark consisting of words, on the ground that at the time of registration such words had become the ordinary name of the article in respect of which they were registered, and also on the ground that they were not used as a trade mark prior to the year 1875, the burden of proof on both points is on the applicant.—*In re Edginton’s Trade Mark*, 61 L.T. 323.
- (v.) **Ch. D.—Registration in Wrong Name—Rectification.**—A trade mark belonging to A. was by mistake registered in the name of B. A. and B. applied to have the register rectified by expunging the name of B., and entering that of A. The application was refused so far as it asked for the entry of A.’s name, and A. was directed to proceed in the usual way to obtain registration.—*E. p. Kingsford*, 61 L.T. 426.
- (vi.) **Ch. D.—Rectification of Register—Person Aggrieved—Patents, &c., Act, 1883, s. 90.**—A person in 1885 registered as a trade mark not used before August, 1875, the words “Gianacli’s cigarettes.” He brought an action against another person for selling cigarettes in boxes labelled “N. Gianuli’s.” The statement of claim mentioned the registration, but did not refer to it in the prayer. The defendant moved to have the mark removed from the register. *Held* (1) that the registration was improper; (2) that the defendant was a person aggrieved; (3) that the mark should be removed at once, as the registration would not be validated even if fraud was proved against the defendant; (4) that the costs should be reserved.—*In re Gianacli’s Trade Mark*, 58 L.J. Ch. 782.
- (vii.) **Ch. D.—Rectification—Person Aggrieved—Descriptive Word—Patents, &c., Act, 1883.**—V. had registered the word “Monobrat” as a trade mark for champagne. The word had been previously registered in France. A very dry wine was sold under the mark, the word “brut”.

meaning a dry wine. R. who had the sole right to sell champagne marked with the registered marks "Monopole" and "Dry Monopole" applied to have the mark "Monobrut" expunged. Held, that "Monobrut" was a descriptive word, that the registration in France made no difference, that R. was a "person aggrieved," and that the mark must be expunged. *Sensible*, that "Monopole" and "Dry Monopole" were not descriptive words, and were proper for registration.—*In re Vignier's Trade Mark.*—61 L.T. 495.

Trust :—

(i.) **Ch. D.—Authorised Investment—Loss—Apportionment.**—Where, in consequence of an authorised investment of trust funds, a loss has arisen after the distribution of a part of the funds among some only of the beneficiaries, the loss must be borne by the beneficiaries in the proportion of their shares remaining undistributed.—*Hutton v. Anderson*, L.R. 42 Ch. D. 559; 58 L.J. Ch. 823; 61 L.T. 458.

Trustee :—

(ii.) **Ch. D.—Beneficiary—Loss of Fund—Liability to Replace—Settlement of Share.**—Mrs. P. was administratrix and one of the next-of-kin of an intestate. Previously to his death, she had covenanted to settle all her after-acquired property. Mrs. P.'s solicitors having misappropriated part of the intestate's estate, held, that Mrs. P. must make good the loss before she could receive anything as next-of-kin, and that the trustees of her settlement were subject to the same equity.—*Short v. Parratt*, 61 L.T. 429.

(iii.) **H. L.—Management—Power to Sell or Borrow—Proof—Furniture given to Widow for Life—Liability of Trustee for.**—When a trustee has power to sell or to borrow for the purpose of paying debts, he must follow the dictates of ordinary prudence in adopting one course or the other, and the question whether he did so or not is one of fact to be solved according to the circumstances of each case. Trustees were appointed under a settlement to pay debts, and pay a portion of the income of the settled property to the settler's widow for the support of the children. The property was to be divided when the youngest child attained 30, and the trustees had power to make further advances for the maintenance of the children. The trustees borrowed a sum to pay a bond debt. The trust was afterwards sequestrated. The settler's furniture was life rented by the widow, she pledged it, and it was lost. The children sought to make the trustees liable for not having sold the property instead of borrowing. The Court ordered an inquiry. Held, that proof must be allowed to substantiate the pursuer's averments as to the value of the property when the trustees took office, and the defender's averments as to their reasons for borrowing; but that the pursuer having been heard on questions of accounting before the reporter, could not re-open those questions. Held, also, that the trustees were not liable for the loss of the furniture, and that they were authorised to make payments out of capital to the widow and children. —*Binnie v. Broom*, L.R. 14 App. Cas. 576.

(iv.) **C. A.—Investment—Improper—Liability—Realising Investment—Notice to Trustee.**—U., a trustee, with power to invest on mortgage, invested too large a sum on a certain mortgage. He afterwards retired from the trust, and the plaintiff, a *cestui que* trust, and the new trustees realised the security without notice to U., and as the security was deficient, sued U. for the loss. Held, that the investment was not like

an investment on an unauthorised security, which the *cestui que* trust must either accept or reject; that the mortgage was part of the trust funds, and that there was no liability to give notice to U. before realizing it; and that U. was liable for the deficiency.—*Priest v. Upplby*, L.R. 42 Ch. D. 351; 38 W.R. 150.

- (i.) **H. L.—Investment—Improper Valuation.**—A trustee lent trust funds on the security of unfinished houses, the only valuation being one by an architect which had been obtained by the borrower. The trustee's law agent, advised that the loan was unobjectionable. *Held*, that the trustee was liable, the security having proved deficient, but that the law agent was not liable, as there was no evidence that he was employed by or on behalf of the *cestuis que* trust. The pursuers were the children of the tenants, for life under the settlement, their interests being contingent, and the tenants for life being debarred from suing by acquiescence; *held*, that the trust fund must be paid to a judicial factor appointed by the Court to abide the event, if and when the pursuers became entitled.—*Rae v. Meek*, L.R. 14 App. Cas. 558.
- (ii.) **Ch. D.—Power to Purchase Land—Equity of Redemption.**—A power to trustees to purchase land does not authorise the purchase of an equity of redemption.—*Worman v. Worman*, 61 L.T. 637.
- (iii.) **Ch. D.—Power to Mortgage—Will.**—A testator devised and bequeathed all his real and personal estate on trusts. He directed that the trustees should have “full power to settle my accounts and wind-up my affairs as they or he shall think fit, and in so doing to make any sales and arrangements they or he shall judge expedient.” The sole trustee who accepted the trusts raised a sum on mortgage to satisfy a pressing claim. *Held*, that the mortgage was authorised by the will.—*Dutton v. Brookfield*, 58 L.J. Ch. 31; 61 L.T. 661; 38 W.R. 90.

Vendor and Purchaser:—

- (iv.) **H. L.—Forfeiture of Deposit—Defect in Title Subsequently Discovered.**—Decision of C. A. (see Vol. 13, p. 57, iv.) affirmed.—*Soper v. Arnold*, L.R. 14 App. Cas. 429; 61 L.T. 702.
- (v.) **C. A.—Right to Rescind—Unwilling.**—Decision of Ch. D. (see Vol. 14, p. 132, iv.) affirmed.—*Starr Bowkett Building Society's Contract re*, L.R. 42 Ch. D. 375; 61 L.T. 346; 38 W.R. 1.

Waterworks:—

- (vi.) **H. L.—New River Company's Act, 1852, ss. 35, 38, 39, 40, 41—Waterworks Clauses Act, 1847—House—Dwelling House—Domestic Purposes.**—Decision of C. A. (see Vol. 13, p. 140, ii.) affirmed.—*Cooke v. New River Company*, L.R. 14 App. Cas. 698.

Will:—

- (vii.) **Ch. D.—Construction—“Younger Children.”**—A testator devised real estate after the death of his wife in strict settlement to his four sons and their issue male successively. He bequeathed a legacy after his wife's death to be paid to his “younger children” naming them, in equal shares, the shares to be absolutely vested at twenty-one, whether the preceding trusts should be determined or not. The two eldest sons died in the widow's life-time without issue male, and the third son became tenant for life, having attained twenty-one in the life-time of his eldest brother. *Held*, that he was entitled to a share in the legacy.—*Prytherch v. Williams*, L.R. 42 Ch. D. 590; 38 W.R. 61.

(i.) **Ch. D.—Construction—Gift to Children—Illegitimate Children.**—Testator gave a fund in trust for his son G. for life, and after his death in trust for his "children." G. had no legitimate children, and did not live with his wife, who was past child bearing at the date of the will. G. lived with another woman by whom he had four children at the date of the will. The testator knew the facts and treated the four children as the children of his son. *Held*, that they did not take under the gift.—*Raggett v. Browne*, 61 L.T. 468.

(ii.) **Ch. D.—Construction—Gift to Children—Substitutionary Gift—Vesting of Shares.**—A testator devised and bequeathed his residue on trust for his wife for life and "at her death to be equally divided among our children, Thomas, James, and Mary Hamilton, to take what would have been their mother's share, and any other of my grandchildren to represent their parents under similar circumstances." The Hamiltons were children of a deceased daughter. Other children died between the death of the testator and that of the widow. *Held*, in spite of the words "in similar circumstances," that the shares of the children so dying were not indefeasibly vested at the testator's death, but went over to their children.—*Miles v. Miles*, 61 L.T. 359.

(iii.) **Ch. D.—Construction—General or Specific Legacy—Ademption.**—A testator bequeathed the sum of £4,000 "at present secured by a mortgage" of lands at P. The mortgage was paid off in the testator's life-time. *Held*, that the legacy was specific, and was addeemed.—*Slade v. Walpole*, 61 L.T. 497.

(iv.) **Ch. D.—Construction—“Securities.”**—A bequest of all "securities for money" includes sums due to the testator in respect of which he has a vendor's lien for unpaid purchase money.—*Callow v. Callow*, L.R. 42 Ch.D. 550; 58 L.J. Ch. 698; 38 W.R. 104.

(v.) **Ch. D.—Construction—“Rest of Furniture and Effects”—Bank-notes, Securities, and Jewellery.**—A testator after giving pecuniary legacies, including one to D., and other legacies, including books, wine and plate, gave to D. "all the rest of the furniture and effects" at the house in which he resided. There was a residuary bequest of all the rest, residue, and remainder of his estate and effects. There were found in the house bank-notes, stock receipts, stock certificates, and some jewellery. *Held*, that the bank-notes, securities, and jewellery did not pass to D.—*Daniel v. Daniel*, 61 L.T. 365.

(vi.) **Ch. D.—Construction—“Relatives”—“Vested Transmissible Interests.”**—A testator gave, subject to the life interest of his wife, legacies on trust for several persons, described in each case as "my cousin," for life and afterwards for their respective children. He also gave certain legacies absolutely. He directed that his residue should be equally divided "amongst such of my relatives hereinbefore named, as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." Some of the persons called "cousins" were not legally so, by reason of the common ancestor having never married. *Held*, that "relatives" meant "legitimate relatives" only, and that the last named persons were excluded. *Held*, also, that "named" meant "mentioned by name," and not merely "referred to." *Held*, also, that "transmissible" meant "capable of transmission after death," and that the persons whose legacies were settled were excluded.—*Jodrell v. Seale*, 61 L.T. 677.

(vii.) **Ch. D.—Debt—Legacy to Creditor—Satisfaction.**—A direction in a will to pay debts only is sufficient to rebut the presumption of the satisfaction of a debt by a legacy. A testatrix gave a bond to her

nephew to secure payment to him of a sum of money within twelve months after her death, if he should be then living; or to his executors, administrators, or assigns if he should be then dead, leaving issue, with interest from the day of her death. By her will she gave him a legacy of a greater amount than the sum so secured. By a codicil she directed that all her funeral expenses and lawful debts should be paid at once. *Held*, that the debt was not satisfied by the legacy.—*Bradshaw v. Huish*, 38 W.R. 199.

- (i.) **Ch. D.—Foreign Charity—*Cy-près*.**—A testator bequeathed a legacy to build a synagogue and school at Jerusalem. The legacy being insufficient for the purpose was paid into Court. The committee of a school close to Jerusalem applied for payment of the legacy to them on the *cy-près* principle. The committee consisted of persons resident in England. *Held*, that there was jurisdiction to make the order.—*Re Davis's Trusts*, 61 L.T. 480.
- (ii.) **Ch. D.—Real Estate—*Trust for Sale—Legacy out of Proceeds—Interest*.**—A testator devised real estate to his wife for life, and after her death on trust for sale, and out of the proceeds he directed a sum of £1,000 to be retained, which sum, with interest to the date of retainer, be settled on certain trusts. He empowered his trustees to postpone the sale for three years after the death of his wife, and directed that the rents should be applied as the income of the proceeds of sale would be applied. *Held*, that the interest on the £1,000 was to run from the death of the wife not from one year after her death.—*Waters v. Boxer*, L.R. 42 Ch. D. 517; 58 L.J. Ch. 750; 61 L.T. 481; 38 W.R. 57.
- (iii.) **Ch. D.—General Bequest—*Power of Appointment*.**—A testatrix had a power to appoint a fund "in such manner as she should by will expressly referring to this present power appoint." She made a general bequest without referring to the power. *Held*, that the power was not exercised.—*In re Tarrant's Trusts*, 58 L.J. Ch. 780.
- (iv.) **Ch. D.—*Power of Appointment—Exercise—Codicil*.**—A marriage settlement gave a power of appointment by will to the survivor of the husband and wife. The husband in the wife's life-time by will disposed of all property over which he might at the time of his death have a power of disposal. After the death of his wife he made a codicil confirming his will. *Held*, that the power of appointment was well exercised by the effect of the codicil in republishing the will.—*Smiles v. Blackburn*, L.R. 43 Ch. D. 75; 38 W.R. 140.
- (v.) **P. D.—*Probate—Signature of Legatees*.**—After a will had been duly executed and attested, the wife of the testator, who under the will took a life interest in the whole estate, signed her name, at the testator's request, under the attestation clause, not to attest it, but to verify its contents. The Court granted probate omitting such signature, on proof that notice had been served on a guardian appointed to represent infants who took a reversionary interest under the will, and that no appearance had been entered.—*In the goods of Smith*, L.R. 15 P.D. 2.
- (vi.) **P. D.—*Revocation—*Destruction—Consent—*Ratification*****.—To effect a revocation by destruction of the will the act of physical destruction must be contemporaneous with the intention to revoke, and a subsequent ratification by the testator of the destruction of his will, which was accomplished without his consent, does not amount to a revocation.—*Mills v. Millward*, 61 L.T. 651.

See *Electio[n]*, p. 40, iv.

Quarterly Digest

or

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter,

FOR FEBRUARY, MARCH AND APRIL, 1890.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

(i.) **Ch. D.—Apportionment—Tenant for Life and Remaindermen—Reversion Falling In.**—By a settlement made on his son's marriage, A. settled two sums on trust, after the death of the son and his wife, and in default of issue of the marriage, as A. should appoint. * A. by will appointed the sums to his son for life, and in default of issue of the son, to A.'s daughters and their children, the daughters taking life interests. A. died in 1834, the son in 1850, without having had issue, and the son's wife in 1889. At her death the settled funds were represented by £25,400 consols. *Held*, that such sum must be apportioned between capital and income, and that the sum of £3,130, being the sum which at the death of A. would, if accumulated at 4 per cent. less income-tax, with annual rests, have produced the value of the £25,400 consols, must be treated as capital.—*Matheson v. Goodwyn*, 62 L.T. 216.

(ii.) **C. A.—Donatio Mortis Causa—Deposit Note—“Not Transferable.”**—A. on his death-bed gave to X. a banker's deposit receipt. The receipt contained a memorandum to the effect that it was not transferable, that the amount was repayable on demand, and that a form of cheque endorsed must be signed by the depositor on withdrawal. The form of cheque was signed by A., but the document was not presented till after his death, when the banker refused to cash it. *Held*, that it was a good *donatio mortis causa*, and that the donor's executors were trustees for the donee, and bound to do anything necessary to effectuate the gift.—*Dafin v. Dafin*, 38 W.R. 369.

(iii.) **C. A.—Simple Contract Creditors—Preference.**—After an action was commenced against an administrator by a simple contract creditor of the intestate, the administrator paid in full another simple contract creditor, and so exhausted the assets. *Held*, that a plea that there were no assets was a good answer to the action.—*Vibart v. Coles*, L.R. 24 Q.B.D. 364; 59 L.J. Q.B. 162, 88 W.R. 359.

(i.) **Ch. D.**—*Creditors whose Addresses are not known.*—Under an administration decree made in 1866 certain creditors carried in proofs, but the assets were insufficient for payment in full. In 1888 further assets fell in, and there was a sufficient fund in Court to pay all creditors in full, but some of the creditors could not be found. *Held*, that a sum of consols ought to be retained to the credit of each such creditor representing the amount of his debt and interest, and that the residue of the fund ought to be fully administered.—*McAlpin v. Macdonald*, 59 L.J. Ch. 231.

(ii.) **Ch. D.**—*Marshalling—Charge of Debts on Real Estate—General Lefacies.*—Where there was a charge of debts on the real estate, and the residuary personal estate was insufficient for payment of debts and funeral and testamentary expenses, *held*, that the personal estate not specifically bequeathed was primarily liable for the payment of such debts and expenses, and must be exhausted before the real estate was resorted to.—*Bate v. Bate*, 59 L.J. Ch. 277.

(iii.) **C. A.**—*Insolvent Estate—Transfer to Bankruptcy—Bankruptcy Act, 1883, s. 125, sub-s. (4).*—The power to transfer to the bankruptcy court the proceedings for administration of an insolvent estate is discretionary, and not imperative. The fact that the Chancery Division recognises the executor's right of retainer, and his right to favour the creditor who obtains an administration order, by refraining from pleading the Statute of Limitations against him, does not make it imperative on the Court to order a transfer. —*Nichols v. Baker*, 38 W.R. 417.

(iv.) **P. D.**—*Intestate a Married Woman Domiciled in Canada—Husband—Citation.*—The intestate was a married woman domiciled in Canada. It was alleged that her husband having married again had, according to the marriage settlement, forfeited his right to her property, and that her children were entitled thereto. Administration was granted to the attorney of the children, the husband having been formally cited. The Court refused to make the grant without such citation on the strength of a single affidavit, though made by a most responsible and respectable person.—*In the goods of Babin*, 62 L.T. 185.

See Charity, p. 78, ii.

Adulteration :—

(v.) **Q. B. D.**—*Scienter.*—A person selling an article of food from which part has been abstracted so as to affect injuriously its quality, substance, or nature, without disclosing the alteration, may be convicted under section 9 of the Sale of Food and Drugs Act, 1875, although at the time of sale he was not aware of the alteration.—*Pain v. Boughtwood*, L.B. 24 Q.B.D. 353; 59 L.J. M.C. 45; 62 L.T. 284; 38 W.R. 428.

Arbitration :—

(vi.) **C. A.**—*Agreement to Refer—Staying Proceedings.*—A lease contained a covenant by the lessor to supply water, and a proviso that all disputes between the parties touching the lease, or its construction, should be referred to arbitration. Subsequently the parties entered into a written agreement relating to the steps to be taken by the lessor to provide a better supply of water, which in some points varied the lessee's rights. The lessee afterwards commenced an action alleging that the agreement had not been performed, and that the stipulated quantity of water had not been supplied. The lessor moved to stay proceedings, and to refer the dispute to arbitration. *Held*, that the plaintiff could claim damages for breach both of the agreement and the covenant in the lease, that the arbitration clause did not refer to

matters arising under the agreement, that the action ought not to be split by referring part to arbitration, and that the proceedings ought not to be stayed.—*Turnock v. Sartoris*, L.R. 43 Ch. D. 150; 62 L.T. 209; 38 W.R. 840.

(i.) **Ch. D.—Injunction to Restrain—Particulars of Differences.**—Partnership articles provided for the reference of disputes to referees, to be appointed by the partners respectively. Questions arose, and two of the partners appointed referees. The third partner alleged that no dispute had arisen within the clause. He asked for particulars as to the alleged differences, and was told that they would be furnished at the proper time. He moved to restrain the arbitration proceedings until the other partners had specified what disputes they wished to refer, or that he might be at liberty to withdraw the submission to arbitration. *Held*, that there was jurisdiction to grant an injunction, but that it ought not to be granted, as an arbitration without particulars and without the consent of the plaintiff would be merely futile.—*Farrar v. Cooper*, 38 W.R. 410.

Bank of England :—

(ii.) **Q. B. D.—Transfer of Consols—Registration—Mandamus—Joint Tenancy—Tenancy in Common—National Debt Act, 1870, ss. 1, 22.**—The Bank of England will not be compelled by mandamus to register a transfer of consols into the joint names of a corporation and an individual.—*Law Guarantee and Trust Society v. Governor and Company of the Bank of England*, L.R. 24 Q.B.D. 406.

Bankruptcy :—

(iii.) **C. A.—Act of Bankruptcy—Notice of Suspension of Payment—Bankruptcy Act, 1883, s. 4, sub-s. 1 (h).**—A notice by a debtor to his creditors “that he is about to suspend payment of his debts” is not an act of bankruptcy unless it is an unqualified, unconditional notice from which an ordinary man of business would understand that the debtor would be obliged to suspend payment unless the creditors would accept less than was due to them. A trader sent his creditors the following circular:—“Being unable to meet my engagements as they fall due, I invite your attendance” (at a time and place specified), “when I will submit a statement of my position for your consideration and decision.” *Held*, by the majority of the Court, to be an act of bankruptcy.—*E. p. Crook; in re Crook*, L.R. 24 Q.B.D. 320.

(iv.) **C. A.—Appeal Against Receiving Order—Notice to Official Receiver.**—Notice of an appeal against a receiving order, whether to a Divisional Court or to the Court of Appeal, must in every case, whether proceedings under the order have or have not been stayed, be served on the official receiver within the time limited by the rules for service on the petitioning creditor.—*E. p. Webber; in re Webber*, L.R. 24 Q.B.D. 318.

(v.) **Q. B. D.—Discharge—Conditional Order—Conduct of Bankrupt—Bankruptcy Act, 1883, s. 28.**—The “conduct” which the Court must consider on the hearing of an application for discharge must be conduct in some way connected with or arising out of the bankruptcy, though it is not confined to instances of misconduct specified in section 28, subsection 3, or in section 24.—*E. p. Jones; in re Jones*, 38 W.R. 429.

(vi.) **Q. B. D.—Notice to Debtor of Public Examination—Service.**—The notice to a debtor of the time and place appointed for his public examination may be sent by prepaid registered post letter.—*E. p. Chief Official Receiver; in re Magrath*, L.R. 24 Q.B.D. 468; 62 L.T. 122; 38 W.R. 416.

- (i.) **Q. B. D.**—*Proof—Partnership—Separate Estate—Proof by Partner.*—A. and B. dissolved partnership, A.'s share of the assets being left on mortgage. B. afterwards became bankrupt, and joint creditors of the old firm were admitted to prove against his estate. *Held*, that A. could not prove against it for his said debt, as he would be proving in competition with his own creditors.—*E. p. Hind*; *in re Hind*, 62 L.T. 327.
- (ii.) **Q. B. D.**—*Solicitor—Employment of—Costs.*—The principle that the trustee cannot recover from a solicitor money paid to him by a debtor in order to secure his services to defend him at the hearing of the petition, does not extend to a charge on money outstanding in the hands of other persons, or to costs incurred in negotiating with creditors with a view to averting bankruptcy proceedings.—*E. p. May*; *in re Spackman*, 62 L.T. 266; 38 W.R. 368.
- (iii.) **Q. B. D.**—*Tender of Debt after Petition—Knowledge of Act of Bankruptcy.*—A creditor who has a knowledge of an act of bankruptcy is justified in refusing a tender of his debt. Consequently where two such creditors for £25 each presented a petition together, and a tender of his debt was made to one of them and refused, *held*, that a receiving order made on the petition must be upheld.—*E. p. Lowe*; *in re Lowe*, 62 L.T. 263.

Bill of Sale:—

- (iv.) **Q. B. D.**—*Description of Grantor—Equitable Mortgage—Consideration—Collusive Judgment.*—The grantor was described in a bill of sale as a "married woman." She carried on a hotel, the licence for which was in her husband's name. *Held*, a sufficient description. The grantee under a bill of sale of goods which are subject to a prior mortgage, has an interest sufficient to protect the goods against an execution creditor. Where the judgment which was the consideration for a bill of sale was alleged to have been collusive, *held*, that evidence to prove collusion was admissible.—*Usher v. Martin*, L.R. 24 Q.B.D. 272; 61 L.T. 778.
- (v.) **Q. B. D.**—*"True Owner"—Bill of Sale of Partnership Property by one of two Partners—Bills of Sale Act, 1882, s. 5.*—A man is the "true owner" of chattels although they may be the subject of some lien or equitable right. One of two partners, with the consent of the other, executed a bill of sale upon partnership property to secure an advance for partnership purposes. *Held*, that he was the "true owner" of an undivided moiety of the goods, and was entitled to retain half the proceeds of the sale thereof.—*E. p. Barnett*; *in re Tamplin*, 62 L.T. 264; 38 W.R. 351.
- (vi.) **C. A.**—*Validity—Address and Description of Attesting Witness—Bills of Sale Act, 1882, ss. 8, 9, 10—Schedule.*—A bill of sale which does not contain both the address and description of the attesting witness, is void, as not "made in accordance with" the statutory form.—*Parsons v. Brand*; *Coulson v. Dickson*, 38 W.R. 388.

Building Society:—

- (vii.) **Ch. D.**—*Trust Investment Act, 1889, s. 3.*—Funds of a benefit building society invested in the names of trustees for the society under the direction of the board are not trust funds subject to the powers conferred by the statute.—*In re National Permanent Mutual Benefit Building Society*, L.R. 43 Ch. D. 431.
- (viii.) **Ch. D.**—*Losses of Investing Members—Liability of Borrowing Members—Terms of Redemption.*—The rules of a building society provided that in the event of there being a "deficiency of income by which the society

may be prevented from meeting its anticipated expenditure and liabilities," the amount should be apportioned between the investing and borrowing members. Losses having occurred; held, that the "liabilities" included the sums due to investing members in respect of their shares, and that the borrowing members were liable to contribute to losses incurred by the investing members. The rules also provided that property mortgaged to the society to secure advanced shares should be secured "until the amount of such shares shall be repaid to the society, with all fines and other payments incurred in respect thereof." Held, that a borrowing member could not redeem except on payment of what might be due in respect of the above-mentioned liability. — *In re West Riding of Yorkshire Permanent Benefit Building Society*, L.R. 43 Ch. D. 407; 59 L.J. Ch. 197; 38 W.R. 376.

(i.) **Q. B. D.**—*Winding-up—Withdrawal—Notice of Insolvency.*—The rules of a building society provided that members might on giving notice withdraw their subscription moneys, with such an amount of interest as might be determined by the committee, with a proviso that the society should not be required to repay such moneys until they had in hand sufficient funds for that purpose, and also to meet the then existing legal liabilities of the society. Held, that the rule only provided for withdrawal while the society was, or was believed to be, solvent, and that notices which were given, or which matured when the society was known to be insolvent, though before the date of the winding-up order, did not entitle the members giving notice to be paid in priority to the other members. Held, also, that members whose notices had matured while the society was believed to be solvent, but who had not received the sums due to them, were not, in the absence of a determination by the committee of the amount of interest payable, entitled to receive interest in the winding-up.—*In re Sunderland 36th Universal Building Society; King v. Rawlings; Rawlings v. Wilkinson; In re Sunderland 32nd Universal Building Society; Rawlings v. Oliver*, L.R. 24 Q.B.D. 394; 62 L.T. 298.

Charity :—

(ii.) **Ch. D.**—*Interest in Land—Railway Debenture—Charge on "Undertaking."*—A mortgage debenture made by a railway company by virtue of a special Act, being in form a grant and assignment to the mortgagee, "her heirs, executors, administrators and assigns, of the North-Eastern Railway and undertaking and all branch railways, lands and hereditaments connected therewith and belonging thereto," may be validly bequeathed to charity, being a charge on the going concern of the company, and giving no right to any specific charge on the surplus lands, or the proceeds thereof if sold.—*Ker v. Dent*, 62 L.T. 55.

Colonial Law :—

(iii.) **P. C.**—*New South Wales—Crown Lands—Rent—Minister of Lands—Crown Lands Act, 1884.*—The Minister of Lands in New South Wales and the Local Land Board ought to concur in fixing a fair rent for the occupation of Crown Lands by persons who have by statute a preferential claim to them; and the Minister has no power to fix the rent at a higher rate than that appraised by the Local Board, without remitting the matter to the Board, and giving all parties interested an opportunity of being heard in open Court.—*Allison v. Burns*, L.R. 15 App. Cas. 44; 61 L.T. 847.

(iv.) **P. C.**—*Victoria—Sale of Land—Rescission of Contract.*—The conditions of sale of land provided that the vendor might annul the sale if the purchaser made any objection which the vendor should be unwilling or

unable to remove. The title disclosed an incumbrance created by T., and the vendor commenced legal proceedings to remove it, but delay was caused by the absence of T. from the colony. The purchaser required the vendor to give an undertaking to remove the incumbrance within a fixed time, or to give an indemnity. The vendor declined, and rescinded the contract. *Held*, in an action for specific performance, that he was entitled to do so.—*Woolcott v. Peggis*, L.R. 15 App. Cas. 42; 61 L.T. 845.

Company:—

- (i.) **Ch. D.—Allotment—Invalid—Ratification.**—An allotment of shares was invalid in consequence of the meeting of directors at which it was made being improperly constituted. B. withdrew his application for shares immediately afterwards. Six months afterwards a resolution was passed at a validly constituted directors' meeting confirming the allotment. *Held*, that the allotment was thereby made valid, and that B. must retain his shares.—*In re Portuguese Copper Mines; Badman's Case; Bosanquet's Case*, 62 L.T. 179.
- (ii.) **Ch. D.—Directors—Appointment of—Subscribers to Memorandum—Allotment—Validity—Minute.**—A company was formed under table A., which provides that the first directors should be determined by the subscribers of the memorandum of association. *Held*, that a nomination of directors by a document signed by all the subscribers was valid, although there was no meeting held for the purpose of such nomination. K., a contributory, applied for further shares, and received a letter of allotment. The transaction appeared in the allotment book, but there was no record of a board meeting having been held at the date. *Held*, that K. being a contributory, the entry in the allotment book was *prima facie* evidence against him; that the entry of a resolution in a minute was not essential to its validity if it could be proved aliunde, and that the burden of showing that there was no allotment fell on K.—*In re Great Northern Salt & Chemical Works Co.*, 62 L.T. 231.
- (iii.) **C. A.—Directors' Meeting—Notice—Waiver of Right to.**—*Held*, that the fact that a director had stated that he would be in Ireland during a certain week was not a waiver of his right to notice of a board meeting to be held in that week, and that the resolutions passed at such meeting, no notice having been sent to such director, were invalid.—*In re Portuguese Consolidated Copper Mines; c. p. Steele*, 62 L.T. 88.
- (iv.) **Ch. D.—Prospectus—Misrepresentation—Contract to take Shares—Rescission—Special Damage—Rate of Interest.**—W. applied for shares in a company on the faith of a statement in the prospectus that certain persons were members of the council of administration. The statement was untrue. *Held*, that W. was entitled to have his contract to take shares rescinded, and to have his deposit-money repaid, with interest thereon by way of special damages. *Held*, also that 4 per cent. was a sufficient rate of interest.—*In re Metropolitan Coal Consumers' Association; Wainwright's Case*, 62 L.T. 80.
- (v.) **Ch. D.—Reduction of Capital—Reduction of only some of the Shares.**—There is nothing in the Companies Acts, 1867 and 1877, which prevents a company reducing some of its shares, without reducing the others.—*In re Gelling Gun Co.*, 59 L.J. Ch. 279; 62 L.T. 312; 88 W.R. 817.
- (vi.) **Ch. D.—Transfer of Business—Winding-up—Dissent—Notice of—Time for.**—*Companies Act, 1862, s. 161.*—A company passed a special resolution for winding-up and for the sale of its business. A shareholder wrote to the secretary expressing his dissent. The special resolution

was afterwards confirmed, and the secretary was appointed liquidator. The notice was not returned to the shareholder, nor was exception taken to its sufficiency till some time afterwards. *Held*, that the notice was a continuing one, and was valid.—*In re London and Westminster Bread Co.*, 69 L.J. Ch. 155; 62 L.T. 224; 38 W.R. 277.

- (i.) **C. A.**—*Sale or Transfer of Business—Dissenting Shareholder—Companies Act, 1862, s. 161.*—Decision of Ch. D. (see Vol. 15, p. 5, v.) affirmed.—*Weston v. New Guston Co.*, 62 L.T. 275.
- (ii.) **Ch. D.**—*Uncalled Capital—Mortgage of—Power—Winding-up.*—The memorandum of association of a company empowered the directors to mortgage all or any part of the company's assets. The articles, which were of even date with the memorandum, empowered the directors to mortgage all or any part of the property of the company, either with or without including all or any definite proportion of the uncalled capital. The company mortgaged its uncalled capital. *Held*, in the winding-up, that the company had power to mortgage its uncalled capital, and that the mortgages were effectual against the unsecured creditors, notwithstanding the winding-up.—*In re Pyle Works*, 62 L.T. 226; 38 W.R. 282.
- (iii.) **Ch. D.**—*Unregistered—Winding-up—Literary Institution—Literary and Scientific Institutions Act, 1854, ss. 29, 30, 33.*—A society was formed in 1844, for the promotion of "moral and intellectual improvement" and "improvement in literature and the arts and sciences." There were life members, annual subscribers and shareholders. The property was vested in trustees, but there was no trust deed. It was never registered under the Companies Acts; that it was within the Literary and Scientific Institutions Act, 1854; and that on its dissolution, the property, after payment of liabilities, must be given to some like institution to be determined by the Court.—*In re Bristol Atheneum*, L.R. 43 Ch. D. 236; 59 L.J. Ch. 116; 61 L.T. 795; 38 W.R. 396.
- (iv.) **Ch. D.**—*Winding-up—Carriage of Order—Costs.*—A creditor for £51 presented a winding-up petition. P., a creditor for £234, asked for the carriage of the order. It appeared that the solicitor to the company, who was not the petitioner's usual solicitor, acted as his solicitor in the matter. *Held*, that a winding-up must be made, but that the petitioner's costs must be disallowed, and the carriage of the order given to P.—*In re Lennox Publishing Co.*, 61 L.T. 787.
- (v.) **Ch. D.**—*Winding-up—Failure of Object—General Words in Memorandum of Association.*—A company was formed to work the R. mine. The memorandum of association mentioned as further objects of the company the purchase and acquisitions of mines and other properties in New South Wales or elsewhere, and generally the carrying on of the business of mining and milling. The directors reported that the R. mine was a failure. At a meeting of the company it was resolved that the directors should endeavour to obtain some suitable property in which to invest the remaining assets of the company. One of the shareholders presented a winding-up petition, which was opposed by the company and by another shareholder. *Held*, that a winding-up order must be made, as the main object of the company had failed.—*In re Red Rock Gold Mining Co.*, 61 L.T. 786.
- (vi.) **Ch. D.**—*Winding-up—Managing Director—Salary—Proof for—Companies Act, 1862, s. 88, sub-s. 7.*—Salary due to the managing director of a company, the directors of which were obliged to be shareholders, and damages claimed by him for breach of a contract to pay him such salary for a term of years, are not debts due to him in his character of

a member of the company, and may be proved for in the winding-up in competition with outside creditors.—*In re Dale and Plant, Limited*, L.R. 43 Ch. D. 255; 59 L.J. Ch. 180; 62 L.T. 315; 38 W.R. 409.

(i.) **Ch. D.—Winding-up—Sale of Business to New Company—Option—Limit of Time—Companies Act, 1862, s. 161.**—Where a company is being wound-up, and its business and assets are to be transferred to a new company in consideration of shares in the new company, the scheme may fix a reasonable time within which shareholders must exercise their option to take the shares in the new company to which they are entitled under the scheme.—*Postlethwaite v. Port Philip Gold Mining Co.*, L.R. 43 Ch. D. 452; 59 L.J. Ch. 201; 62 L.T. 60; 38 W.R. 246.

Contract:—

(ii.) **C. A.—Interest in Land—Statute of Frauds—Agreement to Retire from Partnership.**—Decision of Ch. D. (see Vol. 15, p. 38, i.) affirmed.—*Gray v. Smith*, L.R. 43 Ch. D. 208; 59 L.J. Ch. 145; 38 W.R. 310.

Conversion:—

(iii.) **C. A.—Partnership—Land Speculation.**—Decision of Ch. D. (see Vol. 15, p. 38, iii.) reversed.—*Hulton v. Lister*, 62 L.T. 200.

(iv.) **Ch. D.—Partnership—End of Business—Reconversion.**—In 1873 A. and B., being tenants in common of real estate, entered into partnership as builders under the style of M. & Son, for a period of ten years, the real estate being made partnership assets. In 1877 they ceased to act as builders and sold their plant, but the rents of the real estate were paid to a banking account in the name of M. & Son. Held, that the partnership terminated in 1877, and that from that time the property was reconverted into realty.—*Myers v. Myers*, 61 L.T. 757.

See Will, p. 101, v.

Copyhold.—See Game, p. 80, ii.; Prescription, p. 92, iv.

Costs:—

(v.) **C. A.—Administration Summons taken out by Leave of Judge—Indemnity—Priority.**—A limited company having the conduct of an administration action prosecuted a summons against B. & C., claiming payment of moneys alleged to form part of the estate. The summons was prosecuted with the sanction of the Court. It was dismissed with costs. The company became insolvent, and was wound up. The estate under administration could not pay the costs of either party. Held, that the company having carried on the summons with the sanction of the Court was entitled to be indemnified against the costs incurred by them; that in consequence of the company's right to indemnity, B. and C. had a right directly against the estate; and that as the summons had been dismissed with costs, B. and C. were entitled to their costs in priority to those of the company.—*Blundell v. Blundell*, 59 L.J. Ch. 269.

(vi.) **P. D.—Divorce—Costs against Co-respondent.**—A wife left her husband in Australia against his wishes, came to England, and commenced an adulterous intercourse with A. A. did not at first know that she was a married woman, but continued to live with her after he was aware of it, on the alleged reason that as her husband did not support her, she would otherwise have been driven to lead a life of prostitution. The husband was not in a position to support his wife while living away from him. Held, that under the circumstances A. ought not be condemned in costs.—*Learmouth v. Learmouth*, 59 L.J. P. 14.

(i.) **C. A.**—*Costs Occasioned by Improper Proceedings—Particulars of Objections to Patent—Set-off*—R.S.C., 1888, O. lxxv., r. 27, sub-rs. 20, 21.—If a party to an action desires to raise the question whether he has been put to costs by improper proceedings on the part of another party, he must ask the Judge to direct the taxing master to look into the question, and tax the costs so occasioned. Where a defendant to an action for infringement of a patent denied the infringement, and also delivered objections to the validity of the patent, and, the action being dismissed with costs on the ground of no infringement, the question of validity was not considered, and the defendant not having asked for a certificate that his objections to the patent were reasonable and proper, the costs of such objection were disallowed, held, on a claim by the plaintiff to have the costs occasioned to him by such objections set off against the costs which he had to pay, that the taxing-master had no jurisdiction to consider whether such objections were improper, and therefore could not order the set-off claimed by the plaintiff.—*Garrard v. Edge*, 38 W.R. 455.

(ii.) **Ch. D.**—*Lands Clauses Act—Payment Out—Costs of Incumbrancers*.—On petition for payment out of purchase-money paid into Court under the Lands Clauses Act, the company or local authority must pay the costs (not exceeding two guineas) of incumbrancers on the fund, and the costs of an affidavit of service of the petition on the incumbrancers, even though the incumbrance be created subsequently to the payment into Court.—*In re Olive*, 38 W.R. 459.

(iii.) **Ch. D.**—*Taxation—Separate Proceedings by Same Solicitor—Duplicate Copies*.—W., T. and G. brought separate actions to have their names removed from the register of shareholders of a company. The same solicitor appeared for all. W.'s action was decided first, and it was arranged that the evidence used therein should be used in the other two. Held, that except as regards attendances and other matters which were, or ought to have been, done at one and the same time, the solicitor was entitled to charge in G.'s action as if he had not been engaged in T.'s action.—*In re Metropolitan Coal Consumers' Association; Grieb's Case*, 38 W.R. 462.

County Council:—

(iv.) **Q. B. D.**—*Election—Elector Registered in more than one Division—Local Government Act, 1888, s. 2, sub-sa. (1), (2) (e), and (4)—County Electors Act, 1888, s. 7, sub-sa. (1), (2), (4), (5)—Municipal Corporations Act, 1882, s. 44, sub-s. (1), s. (45), sub-s. (6), s. 51, sub-s. (2)*.—In elections of County Councillors an elector can only vote in one division of the same county, though duly registered as an elector in more than one division.—*Knill v. Touse*, L.R. 24 Q.B.D. 186; 38 W.R. 383; 59 L.J. Q.B. 186; 62 L.T. 259.

County Court:—

(v.) **Q. B. D.**—*Local Jurisdiction—Administration Proceedings—County Courts Act, 1888, ss. 74, 75, 84*.—Where the plaintiff or the defendant in administration proceedings carries on business within the district of a metropolitan County Court, the judge of that Court has jurisdiction, although neither the deceased nor his executor had their place of abode within that district.—*Reg. v. Bloomsbury Judge*, L.R. 24 Q.B.D. 809; 62 L.T. 286; 38 W.R. 320.

Covenant:—

(vi.) **Ch. D.**—*Judgment—Merger—Interest*.—A. covenanted to repay to B. an advance with interest at 18 per cent, by specified instalments, the interest to be deducted from the instalments, and the balance to be

applied in liquidation of the principal. He assigned a policy of insurance as security. B. recovered judgment for the principal with 18 per cent. interest to the date of the judgment. Held, in an action by A. for redemption of the policy, that the covenant for payment of interest was subsidiary to the covenant for the payment of the principal, and was merged in the judgment, and that B. was only entitled to 4 per cent. interest on the judgment debt.—*Arbuthnot v. Bunsilall*, 62 L.T. 284.

Criminal Law :—

- (i.) **C. C. R.**—*Larceny—Post Office—Principal or Accessory*—24 & 25 Vict., c. 94, s. 1.—A person who induces a servant of the Post Office to intercept and hand over a letter, which is in course of transmission by post, is either guilty of larceny as a principal, or is accessory before the fact to the larceny committed by the servant of the Post Office, and in either view can be convicted on an indictment charging him with larceny of the letter.—*Reg. v. James*, L.R. 24 Q.B.D. 439.
- (ii.) **Q. B. D.**—“*Persistent Following*”—“*Picketting*”—*Conspiracy and Protection of Property Act, 1875, s. 7*.—A., who was on strike, was posted as a picket outside the works where he had been engaged, and when the workmen who had taken the places of the strikers came out, silently followed X., one of them, at a short distance down two streets. A crowd which had been waiting outside the works also followed X. with hostile words and gestures. Held, that A. was rightly convicted of wrongfully persistently following X. from place to place with a view to compel him to abstain from doing an act which he had a legal right to do.—*Smith v. Thomasson*, 62 L.T. 68.
- (iii.) **C. C. R.**—*Procuring Abortion—Patient Convicted for Conspiracy—No Evidence of Pregnancy*.—A woman was jointly indicted with others for conspiring to produce her miscarriage by unlawful means. There was no evidence of her pregnancy so as to render the acts criminal if done by herself. Held, that she might rightly be convicted of conspiring to commit a felony.—*Reg. v. Cross*, 38 W.R. 336; *Reg. v. Whitchurch*, L.R. 24 Q.B.D. 420; 62 L.T. 124.
- (iv.) **C. C. R.**—*Plea in Bar—Autre Fois Convict*.—To an indictment for unlawfully wounding, unlawfully inflicting grievous bodily harm, assault occasioning actual bodily harm, and common assault, the prisoner pleaded as a plea in bar a conviction before a court of summary jurisdiction upon the same facts. Such court had inflicted no punishment beyond requiring the defendant to find sureties to be of good behaviour. Held, to be a good plea in bar.—*Reg. v. Miles*, L.R. 24 Q.B.D. 423; 59 L.J. M.C. 56; 38 W.R. 334.

Damages :—

- (v.) **C. A.**—*Detention of Goods—Measure of Damages*.—Decision of Ch. D. (see Vol. 15, p. 7, ii.) affirmed.—*Dreyfus v. Peruvian Guano Co.*, L.R. 48 Ch. D. 316.

See Patent, p. 87, i.

Easement :—

- (vi.) **C. A.**—*Light—Implied Obligation*.—Decision of Ch. D. (see Vol. 15, p. 7, iv.) affirmed.—*Myers v. Catterson*, 62 L.T. 205.
- (vii.) **C. A.**—*Light—Inchoate Right—Extinguishment—Artizans' Dwellings Act, 1875, s. 20*.—The plaintiff built a house in 1867. In 1877 the adjoining land was acquired by a local authority under the Artizans' Dwellings Act, 1875. Held, that the plaintiff had an inchoate right to

the access of light over such land to his house, for which he could obtain compensation, so that the defendant, the tenant of the local authority, who in 1888 built so as to obstruct the plaintiff's lights, was protected by section 20 of the Act.—*Barlow v. Ross*, L.R. 24 Q.B.D. 381; 38 W.R. 372.

Endowed Schools:—

(i.) **P. O.**—*Scheme—Educational Endowment—Religious Education—Recent Endowments—Patronage—Governing Body—Endowed Schools Act, 1869, ss. 5, 14, 16, 19, 29, 39, 42.*—Funds applied in feeding and clothing scholars at a school are an “educational endowment” within section 5 of the Endowed Schools Act, 1869, as well as funds applied in teaching only. Section 29 is not intended to cut down the definition of “educational endowments” given in section 5. The amount of recent endowments spent in maintaining or improving the old property of a school cannot be withdrawn from the operation of a scheme under section 14. Christ’s Hospital is not specially attached to the Church of England within section 19. A provision in a scheme requiring persons in charge of boarding-houses to allow exemptions from prayers and religious worship is not in accordance with section 16. A scheme which pays substantial regard to existing rights of patronage may curtail such rights without giving any compensation. A body corporate which is under an obligation to pay an annual sum to an endowed school upon certain conditions is not a governing body within section 39.—*Governors of Christ’s Hospital v. Charity Commissioners*, 62 L.T. 10.

Executor:—

(ii.) **Ch. D.**—*Legacy to — Renunciation of Probate — Right to Select Beneficiaries.*—A testator gave to each of his three executors a legacy for the trouble of carrying out his will, and also to mark his friendship and regard for them. He gave his residue among certain charities, or such others “as my executors herein named may select.” One of the executors renounced probate. Held, that he was entitled to the legacy, and also to join in the selection of the beneficiaries.—*Crawford v. Forshaw*, 62 L.T. 63; 38 W.R. 412.

Foreign Judgment:—

(iii.) **H. L.**—*Cause of Action—Liability to Avoidance.*—Decision of C. A. (see Vol. 18, p. 74, i.), affirmed.—*Nourion v. Freeman*, L.R. 15 App. Cas. 1; 62 L.T. 189.

Friendly Society:—

(iv.) **C. A.**—*Illegal Rules—Restraint of Trade—Trade Union Act, 1871, ss. 2, 3, 4, 23—Trade Union Act Amendment Act, 1876, s. 16.*—Where the general objects of a Society are legal, as in the case of a provident society for the relief of members when disabled or out of employment, the fact that some of its rules are illegal, as being in restraint of trade does not render the society illegal, so as to prevent a member from recovering money payable to him under one of the rules which is not illegal. Rules made *bond fide* for the purpose of protecting the funds of the society from avoidable claims are not illegal, because they are incidentally to some extent in restraint of trade, provided they go no further than is reasonable and necessary for that purpose.—*Swaine v. Wilson*, L.R. 24 Q.B.D. 252; 59 L.J. Q.B. 76; 62 L.T. 309; 38 W.R. 261.

(i.) **Q. B. D.**—*Trade Union—Restraint of Trade—Jurisdiction of Justices—Friendly Societies Acts, 1875 & 1887—Trades Union Act, 1871, s. 4.*—A Society was registered under the Trades' Union Act, 1871, some of the rules of which were substantially those of a Friendly Society, whilst others related to trade movements and strikes. A member summoned the secretary for non-payment of an allowance for sick pay. Held, that the objects of the Society were not wholly those of a Friendly Society, many of them being in restraint of trade, and that the justices had no jurisdiction to make an order for payment of the allowance.—*Old v. Robson*, 59 L.J. M.C. 41; 62 L.T. 282; 38 W.R. 415.

Game:—

(ii.) **C. A.**—*Inclosure Act—Reservation of Right of Shooting to Lord of Manor.*—A right of shooting game over allotments declared by an Inclosure Act to be the freehold of the allottees can only be reserved to the Lord of the Manor, in express terms or by necessary implication. Held, that there was no such necessary implication in the case of an Act which declared that the lord should have “all rents, services, courts, piscaries, fishing, hunting, hawking, and fowling, &c.,” and all other “privileges,” “and appurtenances” which had been enjoyed by the Lord of the Manor “(other than and except such right of common, pasture, and free warren in respect of conies, which is intended to be extinguished)” as fully as if the Act had not been made; it not appearing whether before the Act, the lord had a general right of free warren.—*Duke of Devonshire v. O'Connor*, L.R. 24 Q.B.D. 468; 35 W.R. 420.

Gas Company:—

(iii.) **H. L.**—*Assigned District—Point of Supply—Metropolis Gas Act, 1860, s. 6.*—Decision of C. A. (see Vol. 13, p. 74, ii.) reversed.—*Gas Light and Coke Co. v. South Metropolitan Gas Co.*, 62 L.T. 126.

Habeas Corpus:—

(iv.) **C. A.**—*Inability to obey Writ caused by Illegal Act.*—The defendant, having permission from the parent of a child to keep the child in his institution, entrusted the child, without the parent's leave, to N., to be adopted and taken out of the country. N. gave the defendant no address, and the defendant alleged that it was impossible to trace him. On an application for a writ of *habeas corpus* directing the defendant to produce the child, held, that his inability to find the child was no reason why the writ should not issue.—*Reg. v. Barnardo (Gossage's Case)*, L.R. 24 Q.B.D. 283; 62 L.T. 44; 38 W.R. 315.

Husband and Wife:—

(v.) **P. D.**—*Divorce—Husband's Petition—Neglect.*—The petitioner, a carpenter, in 1875 went to New Zealand to improve his position. His wife refused to accompany him, and he left her with the two children of the marriage. After his arrival he again asked her to go out, but she again refused. He earned good wages in New Zealand, but contributed nothing to the support of his wife and children. In 1884, hearing that his wife was misconducting herself, he came home, and instituted divorce proceedings, which were undefended. The Court made a decree *nisi*, but directed that the papers should be sent to the Queen's Proctor, that he might make inquiries, and take such proceedings as should seem fit.—*Stevens v. Stevens*, 61 L.T. 844.

- (i.) **P. D.—Divorce—Husband's Petition—Neglect.**—The fact that a wife is extravagant and improvident and involves her husband in debt does not excuse his separating from her, and taking no care or notice of her; and if, after such separation she commits adultery, the husband will not be entitled to a divorce.—*Starbuck v. Starbuck*, 59 L.J. P. 20; 61 L.T. 876.
- (ii.) **P. D.—Divorce—Desertion.**—Where a husband brought his mistress to his house, and the wife, on his refusal to dismiss the mistress, left the house, *held*, that adultery and desertion were established.—*Dickinson v. Dickinson*, 62 L.T. 330.
- (iii.) **C. A.—Divorce—Collusion—Suppression of Material Facts—Matrimonial Causes Act, 1857, ss. 30, 31—Matrimonial Causes Act, 1860, s. 7.**—An agreement between the parties to a divorce suit to withhold from the Court knowledge of material facts tending to support a counter-charge of adultery amounts to collusion, whereby the petitioner, being successful, is deprived of his or her right to a decree, although the facts afterwards come to the knowledge of the Court, and prove insufficient to establish a matrimonial offence against such petitioner.—*Butler v. Butler*, 38 W.R. 390.
- (iv.) **P. D.—Divorce—Alimony—Costs.**—In cross suits for divorce an order for alimony *pendente lite* was made. The jury found all the issues in favour of the wife, and a decree *nisi* was made in her favour. The Queen's Proctor intervened, and at a second trial the jury found her guilty of collusion, but disagreed as to her adultery. The decree *nisi* was then rescinded, and the wife appealed against such rescission. *Ordered*, that the payment of alimony be continued till further *order*; *but held*, that a sum which had been paid into Court as security for the wife's costs ought not to be paid out to her solicitors, on the ground that they had been present at the signature by the husband and wife of a collusive agreement.—*Butler v. Butler*, L.R. 15 P.D. 32; 59 L.J. P. 11.
- (v.) **C. A.—Divorce—Permanent Maintenance—Limitation till Second Marriage—Judge's Discretion.**—An allowance to a wife on her divorce may, at the discretion of the judge, be given either for her life or till she marry again. An appeal lies from the decision of the judge exercising such discretion. No general rule ought to be laid down as to whether or not the allowance should be limited till re-marriage.—*Lister v. Lister*, 62 L.T. 90.
- (vi.) **P. D.—Divorce—Variation of Settlements—Refusal to make Further Variation.**—A decree for divorce having been made on the husband's petition, the marriage settlement was varied, and the wife was ordered to pay the husband an annual sum. She afterwards applied to have the sum reduced, on the ground that owing to the depreciation of securities her income had materially diminished. *Held*, that the application could not be entertained.—*Benyon v. Benyon*, L.R. 15 P.D. 29; 62 L.T. 329.
- (vii.) **P. D.—Judicial Separation—Molestation—Contempt.**—After a husband had obtained a decree of judicial separation against his wife she seriously molested him; *held*, that there was no jurisdiction to attach her for contempt.—*Smith v. Smith*, 59 L.J. P. 15.
- (viii.) **C. A.—Restitution of Conjugal Rights—Written Demand.**—Decision of P. D. (see Vol. 15, p. 42, v.) reversed.—*Smith v. Smith*, L.R. 15 P.D. 47; 59 L.J. P. 9; 62 L.T. 237; 38 W.R. 276.
- (ix.) **P. D.—Restitution of Conjugal Rights—Refusal of Husband to Comply with Decree—Periodical Payments—Estimation of Income—Matrimonial Causes Act, 1884.**—Where a husband refused to comply with a decree for the restitution of conjugal rights, the Court ordered that he should secure to his wife for their joint lives a "periodical payment" equal to

one-third of their joint income, and refused, in estimating the amount of his average income, to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed.—*Theobald v. Theobald*, L.R. 15 P.D. 26; 59 L.J. P. 51; 62 L.T. 187.

Infant:—

(i.) **Ch. D.**—*Maintenance—Accumulations of Surplus—Vested and Contingent Life Interests—Conveyancing Act, 1881, s. 43, sub.s. 2.*—A testator devised and bequeathed property on trust for an infant for life if she should attain twenty-one or marry. He also bequeathed property on trust for the infant for life, without any contingency. In pursuance of an order of Court the trustees paid part of the income of such properties for the infant's maintenance, and accumulated the remainder. They did not distinguish between the income of the different properties, and exercised no discretion as to which fund should bear the charge for maintenance. *Held*, on the infant attaining twenty-one, that she was entitled to the accumulations of the income of the property in which she had a vested life interest, and that, as the trustees had exercised no discretion, the Court would exercise it for them, and order that the charge for maintenance should be borne primarily by the property in which the infant had a contingent life interest.—*Wells v. Wells*, L.R. 43 Ch. D. 281; 59 L.J. Ch. 113; 61 L.T. 806; 38 W.R. 327.

(ii.) **Ch. D.**—*Marriage Settlement—Void or Voidable—Infants' Relief Act, 1874, ss. 1, 2.*—A lady of eighteen, domiciled in England, entered into an ante-nuptial contract, in the Scotch form, for the settlement of her property. The marriage was dissolved in Scotland. *Held*, that the contract was not affected by the Statute, and that it was, as regarded the lady, voidable and not void.—*Duncan v. Dixon*, 62 L.T. 319.

International Law:—

(iii.) **Q. B. D.**—*Privilege of Ambassador—Secretary—British Subject.*—A British subject, accredited to Great Britain by a Foreign Government as a member of its embassy, is exempt from the local jurisdiction of his own country, unless he has been received by the British Government on the express condition that he shall be subject thereto, and, therefore, where such a condition has not been imposed, his household furniture cannot be seized for non-payment of parochial rates.—*Macartney v. Garbutt*, L.R. 24 Q.B.D. 368.

Justices:—

(iv.) **Q. B. D.**—*Jurisdiction—Malicious Injury to Property—Supposition of Right—24 & 25 Vict., c. 27, s. 52.*—The respondent, who owned land over which there was a public footpath, placed posts in the footpath to prevent his cattle from straying down it. The appellant and many other inhabitants of the district pulled up one of the posts, and was convicted of malicious injury to the post. *Held*, that the jurisdiction of the justices was ousted, as the appellant had a fair and reasonable supposition that he had a right to pull down the post as an obstruction to a public footpath.—*Usher v. Luxmore*, 62 L.T. 110; 38 W.R. 254.

See Friendly Society, p. 80, i.; *Metropolis Management*, p. 85, ii.

Landlord and Tenant:—

(v.) **C. A.**—*Public-House—Covenant not to Sell Beer not Purchased from Lessor—Assignable.*—A covenant by the lessee of a public house to deal only in beer purchased from the lessors or their assigns is assignable. Such a covenant touches the demised premises, and the

benefit of it runs at law with the reversion. Even if it did not so run an assignee of the brewery business and good-will of the lessors, and of the reversion of the public-house, the benefit of the covenant being also assigned, would be entitled to sue on the covenant in equity. The covenant is in effect restrictive, and as the lessee presumably got the premises at a lower rent in consideration of the covenant, an injunction to enforce the covenant ought to be granted.—*Clegg v. Hands*, 88 W.R. 433.

(i.) **Q. B. D.**—“*Tenantable Repair*.”—A tenant who is bound to deliver up his house in “good tenantable repair,” is liable for commissive and permissive waste, but is not bound to replace anything worn out by age. He need not repaper where the wall-papers are worn out, nor repaint inside wood-work where the painting is only decorative. If he allows wood-work to perish for want of painting, he is liable for permissive waste. He must patch up the premises as long as patching is reasonable, but need not renew. He need not clean or scour wall-paper or whitewash ceilings.—*Proudfoot v. Hart*, 59 L.J. Q.B. 129.

Licensing:—

(ii.) **Q. B. D.**—*Disqualification—Felony—Free Pardon—Wine and Beerhouse Act, 1870, s. 14.*—A person who has been convicted of a felony, and has received a free pardon, is placed in the same position as to status and character as he was in before the conviction, and a transfer of a licence to him cannot be refused on the ground of such conviction.—*Hay v. Tower Division Justices*, 62 L.T. 290; 38 W.R. 417.

(iii.) **Q. B. D.**—*Game-dealer's Licence—Disqualification—Sale of Beer by Retail—1 & 2 Wm. IV., c. 32, s. 18—4 & 5 Wm. IV., c. 85, s. 19—26 & 27 Vict., c. 33, s. 1.*—The holder of a licence to sell beer in bottles to be drank off the premises is a person “licensed to sell beer by retail,” and is therefore disqualified from holding a game-dealer's licence under the Game Act, 1831.—*Shoobred & Co. v. St. Pancras Justices*, L.R. 24 Q.B.D. 346; 59 L.J. M.C. 63; 62 L.T. 287; 38 W.R. 399.

(iv.) **Q. B. D.**—*Provisional Grant of Licence—Renewal—Refusal—Appeal—Licensing Act, 1874, s. 22.*—A provisional licence may be renewed from year to year like an ordinary licence, and an appeal lies from a refusal by the Licensing Justices to grant such renewal.—*Reg. v. London Justices*, L.R. 24 Q.B.D. 341; 38 W.R. 269.

(v.) **Q. B. D.**—*Sale by Retail—Quantity Sold—Licensing Act, 1872, s. 3—Beerhouse Act, 1834, s. 19—Excise Act, 1825, s. 2.*—The respondent, not being a brewer, held a licence under the Excise Act, 1825, “to sell strong beer in casks of not less than four gallons and a-half imperial gallon measure, or of not less than two dozen reputed quart bottles at one time” for off, consumption. He sold beer in imperial pint and half-pint bottles, the quantity so sold exceeding what would have been contained in two dozen reputed quart bottles. Held, that he had sold beer by retail without a licence, the quantity sold being the criterion.—*Fairclough v. Roberts*, L.R. 24 Q.B.D. 350; 59 L.J. M.C. 54; 38 W.R. 330.

(vi.) **Q. B. D.**—*Transfer—Refusal to one Tenant—Application by Another.*—The holder of a licence for the sale of intoxicating liquors left his house during the currency of the licence. A new tenant applied for a transfer of the licence and was refused, the justices suggesting an application for a new licence. Such application was made and refused. Before the expiration of the original licence a second tenant entered and applied for a transfer. The justices held that the matter was *res judicata*. Held, that they were wrong, and ought to have heard the application.—*Reg. v. Justices of Upper Goldcross*, 62 L.T. 112.

Local Government:—

(i.) **Q. B. D.—Building Line—“Front Main Wall”**—*Public Health Act, 1888, s. 8.*—When the respondent began to build his house B. was building a house on the same side of the road 300 yards from the respondent's site, the front main wall of which was five inches above the ground but below the level of the street. *Held*, that B.'s wall was not “a front main wall of a house or building” so as to make it an offence on the part of the respondent to build his house in advance thereof.—*Ravensthorpe Local Board v. Hinchcliffe*, L.R. 24 Q.B.D. 168; 59 L.J. M.C. 19; 61 L.T. 780.

(ii.) **Q. B. D.—Paving “Expenses—Notice to “Owner or Occupier”**—*Public Health Act, 1875, s. 150.*—In January, 1883, a local board passed a resolution for paving a street, and in May, 1883, served notice on P. requiring him to pave the street. P. had been the owner of the land abutting on the street, but in April, 1883, he conveyed the same to M., the local board having no notice of the conveyance. *Held*, that the notice not having been served on the “owner or occupier,” M. was not liable for the expenses of paving the street.—*Wallsend Local Board v. Murphy*, 61 L.T. 777.

Lunatic :—

(iii.) **C. A. & Ch. D.—Necessaries—Implied Contract**.—A lady, a lunatic not so found, had property producing a small income. Her brother X. placed her in a private lunatic asylum at an annual cost exceeding the lunatic's income. After the death of X., his son Y. and other members of the family continued to maintain her in the asylum. On the death of the lunatic intestate, Y., as executor of X., claimed to be repaid out of the lunatic's estate the sums expended beyond her income in so maintaining her. *Held*, that it was not proved that the placing of the lunatic in an expensive asylum was a necessary, or that the payments made by X. were not intended as a gift.—*Rhodes v. Rhodes*, 62 L.T. 22; 38 W.R. 385.

Marine Insurance :—

(iv.) **Q. B. D.—Excepted Risks—“Consequent upon Collision.”**—A cargo of fruit was insured, the policy containing the clause, “Warranted free from particular average, unless the ship, &c., be stranded, sunk, or burnt, or the damage be consequent upon collision.” The ship carrying the goods was damaged by collision, and had to put in for repairs, and the fruit was damaged by the prolongation of the voyage, and by the handling in unloading and re-loading. *Held*, that the assured could not recover.—*Pink v. Fleming*, 59 L.J. Q.B. 151.

Married Woman :—

(v.) **Ch. D.—Gift to without Power of Anticipation—Mortgage—Forfeiture.**—A married woman was entitled to a life interest in a fund without power of anticipation, and there was a gift over “on her anticipating her income.” She mortgaged her life interest. *Held*, that as the mortgage was wholly inoperative there was no forfeiture.—*Frank v. Museen*, 38 W.R. 425.

Master and Servant :—

(vi.) **Q. B. D.—Defect in Machinery—Employers' Liability Act, 1888, s. 1, sub-s. (1).**—The fact that a machine is, owing to the negligence of the employer, dangerous to the workman who uses it, though it is effective for the purpose for which it is used, is a “defect in the condition of the machinery” which entitles the workman to recover damages against his employer for an injury caused by such machine.—*Morgan v. Hutchins*, 38 W.R. 412.

Medical Practitioner:—

(i.) **C. A.—Removal from Register—Council of Medical Education—Judicial Enquiry—Personal Interest of Member—Medical Act, 1858, s. 29.**—L., a physician, was struck off the register of medical practitioners for “infamous conduct in a professional respect,” the charge being that he had “acted as cover of, or by his presence, advice, and assistance enabled H., an unqualified person, to carry on the business or profession of a medical electrician, and to practise as if he were duly qualified. *Held*, that the offence charged was within the jurisdiction of the Council, and that they were the sole judges whether the offence had been committed. The proceedings before the Council were conducted by the Medical Defence Union. Two members of the Council who were present when L. was struck off the register were subscribers to that Union, but had nothing to do with its management. *Held*, that the proceedings of the Council were not thereby vitiated.—*Leeson v. General Council of Medical Education and Registration*, L.R. 43 Ch. D. 366; 59 L.J. Ch. 233; 61 L.T. 849; 38 W.R. 303.

Metropolis Management:—

(ii.) **Q. B. D.—Ashes—Trade Refuse—Summary Jurisdiction Act, 1879, s. 33—Decision of Magistrate.**—The question whether certain ashes are or are not “trade refuse,” and as such removable by the vestry without special payment, depends on the construction and interpretation of a statute, and is therefore a question of law on which the magistrate, before whom the question is brought, can be required to state a case.—*Reg. v. Bridge*, 59 L.J. M.C. 49; 62 L.T. 297; 38 W.R. 464.

(iii.) **C. A.—Vestry—Superannuation—Amount—29 & 30 Vict., c. 31, ss. 1, 4.—Decision of Q. B. D. (see Vol. 15, p. 49, iii.) affirmed; but held, that the vestry had a discretion, not only to grant or refuse a pension, but also as to its amount, provided that it did not exceed the statutory scale.—*Reg. v. St. Pancras Vestry*, L.R. 24 Q.B.D. 371; 38 W.R. 311.**

Mortgage:—

(iv.) **Ch. D.—Charge on two Funds—Subsequent Assignments—Right of Apportionment.**—Where A., the first mortgagee, has two funds, either or both of which he may apply in paying himself, whether such right arises from a positive charge, or by operation of law owing to the circumstances under which the funds came into his hands, and the funds are assigned, subject to A.’s rights, one to X., and the other to Y., there is an equity between X. and Y. to have A.’s debt paid out of the two funds rateably.—*Moron v. The Berkeley Mutual Benefit Building Society*, 62 L.T. 280.

(v.) **Ch. D.—Collateral Advantage—Solicitor—Auctioneer—Costs.**—A solicitor and an auctioneer were joint mortgagees. The mortgage deed recited that the mortgagees were to be entitled to make the same charges and receive the same remuneration for all business done by them respectively in or about those presents as they would have been entitled to make and receive if they had not been mortgagees, and the mortgagors covenanted to pay the principal moneys stated to be advanced, and every other sum which might be advanced or paid by the mortgagees or either of them, or become owing to them or him by the mortgagors or either of them. The stamp on the deed was sufficient to cover £100 beyond the moneys advanced. *Held*, that on taking accounts under a foreclosure order, the auctioneer was not entitled to a fee for valuing the property on the occasion of the mortgage, and that the solicitor was not entitled to certain sums in respect of costs for business done for the mortgagors after the date of the mortgage and not connected therewith.—*Field v. Hopkins*, 59 L.J. Ch. 174; 62 L.T. 102.

(i.) **Ch. D.—Exclusion of Right to Redeem—Validity.**—A mortgaged his reversionary interest in land contingent on his surviving B. to secure an advance. The mortgagees were to effect a policy on the life of A. against that of B., and, if they paid the premium, were to add them to the debt. The policy, in the event of A. predeceasing B., was to belong absolutely to the mortgagees. A. never paid any of the premiums, and predeceased B. Held, that the condition that the policy was to belong to the mortgagees was void, and that A.'s administrator was entitled to redeem the policy.—*Northampton (Marquis) v. Pollock*, 62 L.T. 313; 38 W.R. 346.

(ii.) **C. A.—Sale by Mortgagee—Error in Particulars—Deduction from Purchase-Money—Liability.**—A mortgagee sold the mortgaged property by auction under his power of sale. The purchaser demanded compensation for an error in the particulars; and, by agreement between the mortgagee and the purchaser, a deduction was made from the purchase money in respect of such error. Held, that the mortgagee was liable for the loss occasioned by such error, but that the amount of liability was not the sum so deducted from the purchase-money, but the amount by which the reduced purchase-money fell short of what would have been obtained if no error had been made. See Vol. 14, p. 115, vi.—*Tonlin v. Luce*, L.R. 43 Ch. D. 191; 59 L.J. Ch. 164; 62 L.T. 18; 38 W.R. 323.

Partnership:—

(iii.) **C. A.—Liquidation—Liquidating Partner—Power to Compromise a Debt.**—By a deed of dissolution of partnership between the plaintiff and defendant, the defendant was appointed to have the sole management of the liquidation of the business. Among the assets of the business was a large debt due from a foreign firm. The defendant proposed to take, in lieu of the debt, shares in a company which was being formed to take over the business of such firm. The plaintiff objected to such scheme. Held, (1) that the deed gave the defendant no power to make such an arrangement without the plaintiff's consent; (2) that the Court could not, by appointing the defendant receiver of the partnership business, give him, against the wish of the plaintiff, any authority not contained in the deed; (3) that an order appointing the defendant receiver having been made in the Court below with the object of enabling the proposed arrangement to be carried out, ought to be discharged.—*Niemann v. Niemann*, L.R. 43 Ch. D. 198; 59 L.J. Ch. 220; 38 W.R. 268.

See Will, p. 101, iv.

Patent:—

(iv.) **Q. B. D.—Action for Infringement—Liberty to Amend Specification—Terms—Patents, &c., Act, 1873, s.s. 49, 20.**—Where a patentee, having commenced an action for infringement, seeks for leave to amend his specification, the judge has the widest discretion as to imposing terms, and such discretion will not be interfered with unless it has been exercised on absolutely wrong grounds. The following terms were upheld as proper: that no damages be recovered, or claim for injunction founded on anything done before amendment; the costs of the action up to the time of amendment to be defendant's costs in the cause; the costs of the application, and the costs caused in the action by the amendment to be defendant's in any event; proceedings to be stayed pending amendment.—*Lang v. The White-cross Co.*, 62 L.T. 119.

- (i.) **Ch. D.—Infringement—Damages—Reduction in Price by Competition—** The defendants infringed the plaintiff's patent, and by their competition reduced the price of the plaintiff's goods. *Held*, that the plaintiff could not have damages for the loss occasioned by such reduction.—*American Braided Wire Co. v. Thomson & Co.*, 62 L.T. 64; 38 W.R. 329.
- (ii.) **Ch. D.—Licence—Provisional Specification—Abandonment of Part—Claim for Royalties.**—The plaintiff, having obtained provisional protection for his patent, granted the defendant a licence to use the same. The plaintiff before completing the letters patent had to abandon part of the invention claimed by the provisional specification, which part, the defendants alleged to be the invention which he desired and intended to obtain in taking the licence. *Held*, that the licence ought not to be declared void, consideration having passed, and there being no misrepresentation in the deed. *Held*, also, that there was no warranty for the whole invention comprised in the provisional specification. *Held*, further, that the plaintiff was entitled to an account of what was due for royalties.—*Otto v. Singer*, 62 L.T. 220.
- (iii.) **Ch. D.—Mortgage of—Parties to Action—Patents, &c., Act, 1873, s. 87.**—The mortgagee of a patent under a registered assignment is a necessary party as co-plaintiff to an action by the patentee against an infringer seeking damages and the ordinary relief.—*Van Gelden, Apsimon & Co. v. Sowerby Bridge United District Flour Society*, 62 L.T. 105.
- (iv.) **Ch. D.—Threats—Restraint of Action for Infringement—Due Diligence—Patents, &c., Act, 1883, s. 32.**—D., a patentee, having granted F. an exclusive licence to use his patent on payment of royalties, threatened F. with legal proceedings for manufacturing articles under the patent without paying royalties, and four months afterwards commenced an action for infringement. F. alleged that the articles were manufactured under B.'s patent, and some time afterwards B., as a "person aggrieved," commenced an action to restrain D. from threatening F. *Held*, on cross-summons by D. and B., that D.'s action was brought with "due diligence," that there was no cause of action for B.'s action, and that all further proceedings therein must be stayed.—*Barrett v. Day; Day v. Foster*, L.R. 43 Ch. D. 435; 38 W.R. 363.

Perpetuity:—

- (v.) **C. A.—Legal Limitations—Estate to Unborn Person.**—Decision of Ch. D. (see Vol. 15, p. 51, v.) affirmed.—*Whitby v. Mitchell*, 38 W.R. 337.
- (vi.) **Ch. D.—Will—Contingent Remainder.**—Devise of land to the use of trustees during the life of testator's daughter in trust for her, and after her death to the use of any husband she might marry after the testator's death, and after the death of the survivor of them to the use of her children as she should appoint, and in default of appointment to the use of her children living at the death of such survivor, or previously dead, leaving issue then living, and if there should be no such child, to the use of the testator's sons and other daughters then living or previously dead leaving issue then living. The daughter, after the testator's death, married a person living at the testator's death, and died without issue. *Held*, that the limitations in default of appointment, after the death of the survivor of the daughter and her husband, were void for remoteness.—*Frost v. Frost*, L.R. 43 Ch. D. 246; 59 L.J. Ch. 118; 62 L.T. 26; 38 W.R. 264.

Poor Law:—

- (vii.) **C. A.—Rating—Vacant Land—Occupation—43 Eliz., c. 2, s. 1.**—Decision of Q. B. D. (see Vol. 15, p. 14, ii.) affirmed.—*Smith v. New Forest Union*, 61 L.T. 870.

(i.) **Q. B. D.**—*Settlement—Illegitimate Child—Place of Birth—Mother Living—Omnis of Proof as to Mother's Settlement*—4 & 5 Wm. IV., c. 76, s. 71.—On an appeal from an order for the removal of an illegitimate child under the age of sixteen, whereby the child was adjudged to be settled at the place of its birth, it was admitted by the respondents that the mother was living, but no evidence was given to shew that she had any settlement. *Held*, that there being no evidence of failure on the part of the respondents to make inquiries, the burden of proof that the mother had a settlement elsewhere than at the place of the child's birth lay on the appellants, and that in the absence of such proof the child must be deemed to be settled in the place of its birth.—*Guardians of the Headington Union v. Guardians of the Ipswich Union*, L.R. 24 Q.B.D. 414.

Practice :—

(ii.) **C. A. & Q. B. D.**—*Action Against Firm—Service on Person Denying that he is a Partner—Conditional Appearance*—R.S.C., 1883, O. ix., r. 6—O. xii., rr. 15, 16—O. xlvi., r. 10.—A writ in an action against a firm was served on R., who was found at the place of business. R. was not informed whether he was served as a partner or not. *Held*, that there was no power to allow R. to enter a conditional appearance, at the same time denying that he was a partner, such appearance to stand till the decision of an issue as to his being a partner or not.—*Davies v. André*, 62 L.T. 298; 38 W.R. 437.

(iii.) **Ch. D.**—*Administration Action—Unnecessary Inquiries—Costs*—R.S.C., 1883, O. lxv., r. 38a.—The executor and trustee of a will, in the year 1879, commenced an action to administer the estate. An order for accounts and inquiries was made. *Held*, that many of the inquiries were unnecessary and improper, but that the order having been made before the General Orders of 1883 came into operation, the trustee was not so much to blame as to be ordered to pay costs. *Held*, that the taxing master might award a lump sum for costs, and apportion it among the parties.—*Stubbs v. Dale*, 62 L.T. 28.

(iv.) **Ch. D.**—*Admission—Different Action*.—An admission in a statement of defence in one action cannot be treated as conclusive in another action between the same parties, but on a different issue.—*Neison v. Walters*, 61 L.T. 872.

(v.) **P. D.**—*Affidavits—Description of Deponents*.—The affidavit of a married woman must state the description of her husband and that of an unmarried woman must give the description of her parents.—*Ellam v. Ellam*, 62 L.T. 831.

(vi.) **C. A.**—*Appeal—Costs*.—In a collision action the Admiralty Division held that the defendant's ship was solely to blame. The Court of Appeal held that the collision was the result of inevitable accident. *Held*, that according to the general rule the unsuccessful party must bear the costs; but having regard to the mode in which the defendant's case had been conducted, the Court ordered that he should only have the costs of the appeal, and that each party should pay his own costs in the Court below.—*The Batavier*, L.R. 15 P.D. 87.

(vii.) **C. A.**—*Appeal—Contempt of Court—Criminal Cause or Matter*.—An application by a party to a pending civil action against a stranger to the action, for attachment for contempt of court committed by the publication in a newspaper of matter calculated to prejudice the fair trial of the action, is a "criminal cause or matter," and there is no appeal from the judgment imposing a penalty on the party in contempt.—*O'Shea v. O'Shea; in re Tuohy*, 38 W.R. 374.

- (i.) **C. A.**—*Appeal—Time for—Final Order in Chambers—Mortgage—Priority—Originating Summons*—R.S.C., 1883, O. iv., rr. 3 (c), (e), (g), 5 (4).—The limit of time for giving notice of motion to discharge or vary a final order made in the Chancery Division by a judge in chambers is twenty-one days from the date when the order was pronounced. There is no jurisdiction to determine on an originating summons a question of priority of mortgages.—*Real and Personal Advance Co. v. Mitchell*, L.R. 48 Ch.D. 391; 59 L.J. Ch. 226; 38 W.R. 273.
- (ii.) **C. A.**—*Appeal—Trial with Jury—Judgment on Further Consideration—Application to Set Aside*—R.S.C., 1883, O. xxix., r. 1; O. xl., rr. 4, 5.—At the trial of an action with a jury, the jury found a verdict for the plaintiff, assessing damages. The judge, on further consideration, held that there was no evidence of liability on the part of the defendant, and entered judgment for him. Held, that an application to set aside such judgment must be made to the Divisional Court, and not to the Court of Appeal.—*Rocke v. McKerrow*, L.R. 24 Q.B.D. 463; 59 L.J. Q.B. 146; 38 W.R. 342.
- (iii.) **Q. B. D.**—*Costs—Plea of Tender Before Action—Payment into Court—R.S.C.*, 1883, O. xxii., r. 7.—To a claim for money had and received to the plaintiff's use the defendants pleaded tender of a sum before action brought, and payment of that sum into Court in full satisfaction of the claim. The plaintiff took the money out of Court in full satisfaction of the claim, and sought to have his costs taxed under Order xxii., r. 7. Held, that he was not entitled to do so, as the plea of tender raised an issue which remained unsatisfied upon the record; and in respect of which the defendants were entitled to go to trial.—*Griffiths v. School Board for Ystradgynodwg*, L.R. 24 Q.B.D. 307; 59 L.J. Q.B. 116; 62 L.T. 151; 38 W.R. 425.
- (iv.) **C. A.**—*County Court—Costs—Particulars—Solicitor's Signature—County Court Rules*, 1889, O. vi., r. 10 & Appendix.—Decision of Q. B. D. (see Vol. 15, p. 54, i.) affirmed.—*Reg. v. Cowper*, 38 W.R. 408.
- (v.) **Q. B. D.**—*County Court—Costs—Higher Scale—Certificate—Signature of—County Courts Act*, 1880, s. 119—*County Court Rules*, 1889, O. 1., r. 8.—In a County Court action the judge ordered costs on the higher scale, but did not sign the statutory certificate till next day, when it was entered at the end of the minutes of the day on which the order was made. Held, that he could lawfully adopt that course.—*Badcock v. Hunt*, 38 W.R. 255.
- (vi.) **Q. B. D. & C. A.**—*County Court—Power to Remit Action—Reduction of Claim by Payment after Action—County Courts Act*, 1880, s. 65.—Where, in an action of contract, the claim indorsed on the writ is reduced by payment of part after action brought to a sum not exceeding £100, there is no jurisdiction to remit the action for trial to a County Court.—*Hodgson v. Bell*, L.R. 24 Q.B.D. 302; 38 W.R. 825.
- (vii.) **Q. B. D.**—*Discovery—Power to Interrogate Infant*.—An infant will not be ordered to file an affidavit in answer to interrogatories.—*Mayor v. Collins*, L.R. 24 Q.B.D. 361; 62 L.T. 326; 38 W.R. 349.
- (viii.) **P. C.**—*Criminal Appeal*.—Leave to appeal to the Privy Council in a criminal case will not be given on the ground of the violation of a technical rule of procedure, or for an error in the form of an indictment or information, but only in a case where there has been a departure from the principles of natural justice.—*Dinizulu v. A.-G. for Zululand*, 61 L.T. 740.

(i.) **Ch. D.**—*Discovery—Production of Documented Agreement to Grant Lease—Specific Performance—Lessor's Title Deeds—Vendor and Purchaser Act, 1874, s. 2.*—The owners of a freehold estate commenced an action for the specific performance of an agreement by the defendant to accept a lease of the estate for a term of years. The agreement provided that the plaintiffs should enter into a covenant for the free use by the defendant of a "drive" as a means of access to the estate. Held, that the plaintiffs could not be compelled to produce documents relating to their title to the freehold estate. Held, also, that the plaintiffs must produce the documents relating to their right to grant the use of the "drive," there being with respect to the "drive" no agreement to grant or assign a term of years.—*Jones v. Watts*, 62 L.T. 58.

(ii.) **Q. B. D.**—*Discovery—Security for Costs—Dispensing With—R.S.C., 1883, O. xxxi, rr. 25, 26.*—A judge or master has a discretion to dispense with the deposit required from an interrogating party for security for the costs of discovery.—*Newman v. L. & S.W.R.*, L.R. 24 Q.B.D. 454; 62 L.T. 290.

(iii.) **Q. B. D.**—*Interrogatories—Libel Action against Newspaper—Discovery of Source of Information—Discovery as to Extent of Circulation.*—In an action for libel against a newspaper, the only issue being as to the amount of damages, the plaintiff cannot interrogate the defendant as to the source of the information on which the libel was founded, although the object of the interrogatory is to increase the damages by showing gross recklessness. The defendant cannot refuse to give the number of copies of the newspaper issued to the public on the ground of the inconvenience or impossibility of doing so: he must give the number approximately.—*Parnell v. Walters*, L.R. 24 Q.B.D. 441; 59 L.J. Q.B. 125; 62 L.T. 75; 38 W.R. 270.

(iv.) **P. D.**—*Divorce—Service of Citation.*—In a petition for divorce it appeared that the respondent and co-respondent were residing together abroad, and that by the law of the place where they were the co-respondent, a foreigner, had a right of action against any person serving him with English process. Held, that the citation might be served on him by sending it by registered letter, a copy being sent to the respondent.—*Trubner v. Trubner*, L.R. 15 P.D. 24; 62 L.T. 180; 38 W.R. 464.

(v.) **P. D.**—*Divorce—Petition—Affidavit—Consul—Matrimonial Causes Act, 1858, s. 20—Divorce Court Rules, r. 142.*—The petitioner was resident abroad as British Consul, and as such was himself the only authority in the place where he resided before whom an affidavit could be sworn. As he was not, by rule 142, competent to swear his own affidavit, held, that the petitioner's solicitor should verify the petition to the best of his knowledge and belief.—*Russell v. Russell*, 59 L.J. P. 18; 62 L.T. 186.

(vi.) **Ch. D.**—*Foreclosure—No Defence—Personal Judgment for Amount Due.*—The plaintiff in a foreclosure action did not in his statement of claim ask for a personal judgment against the defendant for the amount due. Held, that he could not, on a motion for judgment in default of pleading by the defendant, who did not appear, have such a personal judgment, as the defendant's admission could only be treated as made for the purpose of the relief asked by the statement of claim.—*Faithfull v. Woodley*, L.R. 48 Ch. D. 287; 61 L.T. 808; 38 W.R. 326.

(vii.) **C. A.**—*Garnishee—Attachable Debt—Unsigned Judgment—Judgment Against Separate Estate.*—*R.S.C., 1883, O. xlv., r. 1.*—Decision of Q.B.D. (see Vol. 15, p. 55, ii.) affirmed.—*Holtby v. Hodgson*, 59 L.J. Q.B. 48; 62 L.T. 145.

(i.) **C. A.**—*Interpleader—Shares—Certificate and Transfer—Chose in Action*—R.S.C., 1883, O. lvii., rr. 1, 2.—The plaintiff, a registered proprietor of shares in a company, executed a transfer of the shares to the defendants, who were brokers, to enable them to sell the shares, and handed them the transfer and the certificate of the shares for that purpose. He afterwards demanded back the certificate and transfer. X. gave the defendants notice that he claimed the shares, and the defendants applied for an interpleader order. Held, that they were entitled to interplead, as X. was in effect claiming the documents. Semble, that a chose in action may be the subject of interpleader.—Robinson v. Jenkins, L.R. 24 Q.B.D. 275; 59 L.J. Q.B. 147; 38 W.R. 360.

(ii.) **Ch. D.**—*Judgment by Default—Setting Aside*—R.S.C., 1883, O. xiv., s. 6; O. xxvii., r. 15.—Judgment being applied for on a specially indorsed writ, the defendant obtained leave to defend on paying money into Court. He made default, and judgment was signed. Held, that there was jurisdiction to set aside such judgment.—*In re Portuguese Copper Mines; Badman's Case*, 62 L.T. 179.

(iii.) **P. D.**—*Nullity—Alleged Insanity—Guardian ad Litem*.—An order ought not to be made under rule 196 assigning a guardian ad litem to a person alleged to be of unsound mind where there is a substantial dispute as to the unsoundness of mind of such person.—*Fry v. Fry*, L.R. 15 P.D. 25; *Routh v. Fry*, 59 L.J. P. 14.

(iv.) **Q. B. D.**—*Official Referee—Motion to Set Aside Judgment*—R.S.C., 1883, O. xl., r. 6.—A motion to set aside a judgment directed to be entered by an official referee is properly made before a Divisional Court.—*Proudfoot v. Hart*, 59 L.J. Q.B. 129.

(v.) **Ch. D.**—*Official Referee—Reporting on Accounts—Form of Report*.—An official referee is not bound to take accounts referred to him in the manner in which they would be taken in chambers. He need not, in complicated accounts, refer to each item in his report, but may strike a balance upon the result of the inquiry generally. The parties may use the notes of the inquiry and of the evidence for the purpose of tracing any item allowed or disallowed which they may desire to question.—*Turpin v. Pain*, 38 W.R. 422.

(vi.) **Q. B. D.**—*Particulars—Action for Seduction*.—In an action for seduction particulars of the time and place of the alleged seduction will not be ordered before the defendant has delivered his defence, unless he states by affidavit his intention of denying the seduction.—*Knight v. Engle*, 61 L.T. 780.

(vii.) **Ch. D.**—*Taxation of Costs—Action for Injunction and Damages—Payment into Court—Acceptance in Satisfaction—Discontinuance*—R.S.C., 1883, O. xxii., rr. 6, 7; O. xxvi., r. 1.—In an action for injunction and damages for a nuisance, a motion for an interlocutory injunction and damages stood over by consent, the defendant having stopped the nuisance. The defendant by his defence denied his liability, but paid money into Court in respect of the claim for damages. The plaintiff accepted the money in satisfaction of such claim, and wrote that he would take the money out of Court, discontinue the action, and tax his cost. Held, on cross summonses by both parties, that the letter was not a notice of discontinuance, so as to entitle the defendant to costs, and that as the whole cause of action was not satisfied by the money paid into Court, the plaintiff was not entitled to tax the whole costs of the action.—*Moore v. Dickinson*, 38 W.R. 278.

(i.) **Ch. D.**—*Winding-up—Two Petitions—Priority.*—Where two petitions have been presented for winding-up a company, the second in order of presentation being the first advertised, and the same day has been fixed for answering both petitions, the order will be made on the petition first presented, unless it is shown not to have been presented *bond fide*. A petitioner is entitled to a reasonable delay in the day for which his petition is to be answered, subject to the risk of losing his priority.—*E. p. Laughton; e. p. Pooley; in re Building Societies Trust*, 88 W.R. 458.

(ii.) **Q. B. D.**—*Writ Specially Indorsed—Application for Judgment—Delay—Defence Delivered*—R.S.C., 1863, O. xiv., r. 1.—The fact that the defence has been delivered is not an absolute bar to an application for judgment on a specially indorsed writ, but if such application is made after the defence is delivered, the onus of explaining the delay is on the plaintiff.—*McLardy v. Stateum*, L.R. 24 Q.B.D. 504; 59 L.J. Q.B. 154; 62 L.T. 151; 38 W.R. 349.

(iii.) **P. D.**—*Writ of Summons—Probate Action—Declaration of Legitimacy.*—The Court refused to allow the plaintiff in a probate action to include in the writ of summons a prayer for a declaration of legitimacy.—*Warter v. Warter*, L.R. 15 P.D. 35; 62 L.T. 328.

See Solicitor, p. 97, iii.; Will, p. 100, v.; Administration, p. 70, i.

Prescription:—

(iv.) **Ch. D.**—*Copyhold—Profit a Prendre—Fishing—User—Enfranchisement—Prescription Act, ss. 1, 4.*—A claim to a profit *a prendre*, such as a right of fishing, cannot be established by prescription in favour of an indefinite class, such as owners and occupiers of copyhold tenements of a manor. Where the right of fishing in a river bounding the defendant's land had been exercised by the plaintiff and his predecessors in title for sixty years, but was interrupted by the defendant four years before the date of the action, and had not been resumed, held, that a claim based on user to the right of fishing could not be established. Where A. is entitled as a copyhold tenant of a manor to a right of fishing in a certain river, such right is a customary right attached to his copyhold tenement, and is therefore extinguished by enfranchisement; and if the lord makes a fresh grant of such right by the enfranchisement deed, such fresh grant can have no effect against B., who formerly held a copyhold tenement bounded by the same river, and who enfranchised his tenements, including the bed of the river *ad medium filum aquæ*, before the date of A.'s enfranchisement.—*Tilbury v. Silva*, 62 L.T. 254.

Principal and Agent:—

(v.) **C. A.**—*Sale on Del Credere Commission—Profit—Non Disclosure of Buyer's Name.*—Decision of Ch. D. (see Vol. 14, p. 124, iii.) affirmed.—*Guy v. Churchill*, 62 L.T. 132.

Railway:—

(vi.) **C. A.**—*Compensation—Lands Clauses Act, 1845, s. 68—Railways Clauses Act, 1845, ss. 6, 16—Obstruction of Light.*—Decision of Q. B. D. (see Vol. 15, p. 58, vii.) affirmed.—*In re Arbitration between the London Tilbury and Southend Railway Co. and the Trustees of Gover's Walk Schools*, L.R. 24 Q.B.D. 826; 59 L.J. Q.B. 162; 62 L.T. 306; 38 W.R. 343.

(vii.) **H. L.**—*Minerals under Line—Bonâ Fide Intention to Work—Notice by Owner—Injunction—Railways Clauses Act, 1845, ss. 6, 77, 78, 79.*—Decision of C. A. (see Vol. 13, p. 88, viii.) affirmed.—*M. R. v. Robinson* L.R. 15 App. Cas. 19; 62 L.T. 194.

(i.) **C. A.**—*Scheme of Arrangement—Assent of Shareholders—Preferred Shares—Railway Companies Act, 1867, ss. 12, 17.*—The shares of a railway were, in accordance with powers contained in its Act, divided into preferred and deferred half-shares; each preferred half-share being entitled to dividend in priority to the deferred half-share bearing the same number. The directors prepared and filed a scheme of arrangement with the company's creditors. Held, that the holders of preferred half-shares were not preference shareholders, nor a class of preference shareholders, and that their assent as such need not be procured.—*In re Brighton and Dyke Ry. Co.*, 38 W.R. 321.

(ii.) **C. A.**—*Scheme of Arrangement—Railway Companies Act, 1867, ss. 7, 17, 18.*—A dock and railway company, being unable to pay its debts, prepared a scheme of arrangement with its creditors. The scheme was objected to by creditors who had not obtained judgment and held no security for their debts. Held, that the scheme did not deprive the creditors of any legal rights which they possessed, and was a reasonable and honest scheme, and likely to be beneficial to all the creditors as well as to the company, and that it ought therefore to be confirmed.—*In re East and West India Dock Co.*, 62 L.T. 239.

Railway and Canal Commission :—

(iii.) *Jurisdiction—Railway and Canal Traffic Act, 1854, ss. 1, 2, 3—Railway and Canal Traffic Act, 1888, ss. 1, 8.*—The Court has jurisdiction to require a railway company to resume passenger traffic over a part of its line on which such traffic has been discontinued.—*Winsford Local Board v. Cheshire Lines Committee*, L.R. 24 Q.B.D. 456; 62 L.T. 268.

Registration :—

(iv.) **Q. B. D.**—*Householder—Service Franchise—Payment of Rates—Municipal Corporations Act, 1882, s. 32—County Electors Act, 1888, s. 2, sub-s. 1.*—The claimants were farm labourers, and were permitted, but not required, to occupy cottages on their employer's farm, on the terms that they were to give up possession when their employment ceased, and were charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employer, and the claimants' names were on the rate books as occupiers. Held, that they were entitled to the household, and not the service franchise, and to be placed on the list as both parliamentary voters and county electors, personal payment or tender of the rates not being made requisite by section 32 of the Municipal Corporations Act, 1882.—*Marsh v. Estcourt*, L.R. 24 Q.B.D. 147; 59 L.J. Q.B. 100.

(v.) **Q. B. D.**—*Lodger—Declaration—Mistake in—Amendment—Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 2.*—The declaration made by a lodger is part of his claim, and the revising barrister has power to correct mistakes in the declaration.—*Ainsley v. Nicholson*, L.R. 24 Q.B.D. 144; 59 L.J. Q.B. 102; 61 L.T. 809.

(vi.) **Q. B. D.**—*Old Lodger Claim—Made Out of Time—Revising Barrister—Jurisdiction—41 & 42 Vict., c. 26, s. 22—48 Vict., c. 15, s. 18.*—A person on the list of lodger voters made out his claim to be put on the register for the next year, and gave the same to another person to be forwarded to the overseers in time to be forwarded to them by the appointed day. The claim, however, did not reach the overseers by the appointed day, and the claimant was not put on the list. Held, that the sending of such claim to the overseers by the appointed day was a matter of substance, and that the revising barrister had no jurisdiction to put the claimant on the list.—*Whitewell v. Clerk of the Peace for North Riding of Yorkshire*, 59 L.J. Q.B. 96; 61 L.T. 811.

(i.) **Q. B. D.**—*Successive Occupation—Servant and Householder—Representation of the People Act, 1867, s. 26—Representation of the People Act, 1884, ss. 2, 3.*—Occupation during the qualifying period of two dwelling houses in immediate succession, the first by virtue of service, the second as a householder, is a qualification for the parliamentary occupation franchise.—*Nicholson v. Yeoman*, L.R. 24 Q.B.D. 145; 59 L.J. Q.B. 104; 61 L.T. 813.

(ii.) **Q. B. D.**—*Notice of Objection—Service of.*—A notice of objection was placed in the letter-box of the house which was stated in the list to be the abode of the voter objected to. The voter had not resided in the house for two years, the objector did not know his true address, and there was no reason to suppose that the notice of objection reached or was likely to reach the voter. Held, that the service was not sufficient.—*Giford v. Overseers of St. Luke's*, L.R. 24 Q.B.D. 141; 59 L.J. Q.B. 98; 61 L.T. 810.

Rent Charge:—

(iii.) **C. A.**—*Recovery—Uncertainty as to Land Charged—Copyhold Act, 1887.*—Decision of Ch. D. (see Vol. 15, p. 19, i.) affirmed.—*Searle v. Cooke*, 59 L.J. Ch. 259; 62 L.T. 211.

Restraint of Trade.—See *Friendly Society*, p. 79, iv.; 80, i.

Revenue:—

(iv.) **Q. B. D.**—*Excise—Hackney Carriage—Omnibus.*—An omnibus running along a fixed route is a “hackney carriage” within the meaning of the Customs and Inland Revenue Act, 1888, section 4.—*Hickman v. Birch*, L.R. 24 Q.B.D. 172; 59 L.J. M.C. 22; 62 L.T. 113.

(v.) **Q. B. D.**—*Income Tax—Annuities Payable out of Profits—Assessment of Profits—5 & 6 Vict., c. 35, s. 102.*—An insurance company granted life annuities in consideration of sums of money paid at the times of the grants, and claimed to deduct from their profits chargeable with income tax the sums paid in discharge of such annuities. Held, that the annuities were paid out of “profits or gains,” and were chargeable with income tax in the hands of the company.—*Gresham Life Assurance Society v. Styles*, L.R. 24 Q.B.D. 500.

(vi.) **Q. B. D.**—*Income Tax—Deduction—Manorial Dues—Income Tax Acts, 1842 & 1853.*—For the purpose of assessment to the income tax, the lord of a manor is not entitled to deduct the costs of collection from the amount of manorial dues received.—*Duke of Norfolk v. Lamarque*, L.R. 24 Q.B.D. 485; 59 L.J. Q.B. 119; 62 L.T. 153; 88 W.R. 382.

(vii.) **Q. B. D.**—*Income Tax—Exemption—Premium on Life Insurance—Foreign Company.*—A person who has insured his life with a foreign company is not entitled to deduct the premiums from his income-tax assessment.—*Colquhoun v. Heddon*, L.R. 24 Q.B.D. 491; 59 L.J. Q.B. 142; 62 L.T. 155; 88 W.R. 366.

(viii.) **Q. B. D.**—*Stamp Duty—Settlement—Contingent Interest—Proper Stamp—Stamp Act, 1870, Schedule.*—A marriage settlement comprised the contingent interest of the settlor in certain stocks and property, the investments representing which could be varied at pleasure by the trustees of the settlement. Held, that the instrument was a settlement of a “certain and definite amount of stock,” and must bear an *ad valorem* stamp accordingly.—*Onslow v. Commissioners of Inland Revenue*, 88 W.R. 445.

Riparian Owner :—

(i.) **P. C.—Floating Wharf—Title by Possession—Action for Pollution and Obstruction.**—A piece of land abutting on a navigable river was in 1850 granted by the Crown to A., the boundary on the river side being expressed to be a line “two chains distant from the shore,” “parallel to the general course of the shore.” A. conveyed to P. and P. conveyed to X. In the latter conveyance, dated in 1867, the boundary was expressed to be the “water’s edge.” X. for many years kept moored in the river opposite the land a floating wharf, which he used for the purposes of his business as a boatman. Held, that the possession following on the conveyance had given X. a good *prima facie* title to the space of two chains breadth from the shore; and that he could maintain an action for pollution of the river, and obstruction to the navigation and to the access to his wharf.—*Booth v. Ratts*, 62 L.T. 198.

Settled Land :—

(ii.) **Ch. D.—Capital Money—Improvements—Evidence—Improvement of Land Act, 1864—Settled Land Act, 1882, s. 25.**—Application that capital money might be applied in payment of such part as represented capital of a charge payable under an order of the Land Commissioners. The Inspector of Works of the Land Commissioners had, in 1883, certified that the works consisted of new farm buildings, & new roof to a cow-house, a new cow-house, and the alteration and re-arrangement of farm buildings, and that in his opinion they would produce a permanent improvement in the value of the land exceeding the yearly amount proposed to be charged. Held, that the evidence was not sufficient to shew that the work was not work for which the tenant for life was liable, nor that the work came within the description of improvements in section 25 of the Settled Land Act, 1882, and that the application must be refused.—*In re Newton’s Settled Estates*, 61 L.T. 787.

Settlement :—

(iii.) **Ch. D.—Resulting Trust.**—By a voluntary settlement it was declared that the trustees should stand possessed of the trust property in trust for J. and her children, subject to the like trusts, &c., as were declared of certain property by an indenture of even date with the settlement, and made between the same parties. No such indenture was executed, but there was an indenture prepared and engrossed settling property on trust for J. for life, with remainder to her children. This was never executed, but instead a deed was executed on the same day as the settlement, but not between the same parties, conveying the property to J. absolutely. Held, that there was no trust for J. and her children sufficiently declared, and that there was a resulting trust for the settlor.—*Wilcock v. Johnson*, 62 L.T. 317.

Sheriff :—

(iv.) **Q. B. D.—Costs of—Taxation—Appeal—Sheriffs Act, 1887, s. 20, sub-s. (2)—General Order, August 31, 1888, Schedule.**—The power of the master or district registrar who taxes the Sheriff’s costs and charges of an execution is limited to ascertaining whether the costs and charges are according to the statutory scale; he cannot deal with the question of liability; and there is no appeal from his decision.—*Townend v. Sheriff of Yorkshire*, 59 L.J. Q.B. 166; 88 W.R. 381.

Ship :-

(i.) **H. L.**—*Collision—Crossing Ships—Regulations*, Arts. 16, 18, 23.—Where two steam-ships are approaching each other so as to involve risk of collision, and it is the duty of one to keep out of the way, and of the other to keep her course, the latter is bound, if necessary, to slacken speed or to stop and reverse, and if she does not do so the onus lies on her to show that to continue her speed was the best and most seaman-like manœuvre under the circumstances.—*The Mennion*, 62 L.T. 84.

(ii.) **C. A.**—*Collision—“Crossing”*,—*Thames Rules*, Arts. 24, 25.—A ship ceases to be “crossing” the river when her stern has got so far across that it can go no further, although she is still athwart the stream; but where she is swinging for the purpose of turning in the river with her anchor down but not holding, she has not ceased to be a “crossing” ship if she is still moving towards the shore, although she may have got more than athwart, and although her stern may be swinging to the tide. The A. was about to turn in the river. Her helm was ported, and anchor let go so that it dredged, and she began to swing round with the tide. The B., which had followed the A. up the river, took no steps to keep out of the way of the A., although she saw that the A. was not keeping out of her way, and a collision occurred. *Held*, that both were to blame, the A. for not keeping out of the way of the B.; and the B. for failing to take steps to avoid a collision, when it was apparent that the A. was neglecting her duty.—*The River Derwent*, 62 L.T. 45.

(iii.) **C. A.**—*Collision—Damages—Consequential*.—In a collision, for which the A. was to blame, the X. lost her compass and other articles necessary for navigation. After the collision the X. grounded owing to the loss of such articles, and without any negligence on the part of her captain. *Held*, that the grounding was a natural and reasonable consequence of the collision, and that the A. was liable for the damages occasioned thereby.—*The City of Lincoln*, L.R. 15 P.D. 15; 59 L.J. P. 1; 62 L.T. 49; 38 W.R. 345.

(iv.) **C. A.**—*Collision—Lights—Regulations*, Art. 6—*Merchant Shipping Act*, 1873, s. 17.—In a collision where either party has infringed the Regulations, he must be deemed in fault unless he can shew that the infringement could not possibly have caused or contributed to the collision. A steamship collided with a sailing-ship. The sailing-ship's red light was obscured by the sails to a vessel right ahead, but was in fact always open to the steamship. *Held*, that though the sailing-ship had infringed the Regulations as to lights, such infringement could not possibly have contributed to the collision, and that the sailing-ship was not to blame.—*The Duke of Buccleugh*, 62 L.T. 94.

(v.) **P. D.**—*Fog—Fog-Horn—Regulations for Preventing Collisions*—Art. 12.—A sailing vessel when in stays in a fog, must give, at intervals of not more than two minutes, one blast on her fog-horn when the wind is on her starboard side, and two blasts when it is on her port side.—*The Constantia*, 62 L.T. 286; 38 W.R. 272.

(vi.) **P. C.**—*Collision—Regulations*, Arts. 18, 22.—In a collision it appeared that one vessel had been navigated with reckless negligence, and that the other had committed a comparatively venial error in not slackening speed in good time. *Held*, that the second vessel must be pronounced to blame as well as the first.—*The Arratoon Apcar*, L.R. 15 App. Cas. 87; 62 L.T. 881.

(vii.) **P. D.**—*Mortgage—Arrest—Indemnity from Co-owner*.—A ship was arrested in a suit by the master for his disbursements. The plaintiff,

mortgagor of part of the shares, paid the amount of his claim. *Held*, that as the plaintiff could not obtain possession of his shares while the ship was under arrest, and as his mortgagor and the other owners were severally liable for the master's disbursements, the plaintiff was entitled to recover from the other owners the amount so paid.—*The Orchis*, L.R. 15 P.D. 38.

Slander :-

(i.) **Q. B. D.—Inuendo—Sufficiency of.**—In an action for slander the statement of claim alleged that the defendant falsely and maliciously spoke and published the following of the plaintiff: "Did he (meaning the plaintiff) have a fire twice?" (meaning thereby that the plaintiff had upon two occasions set his business premises on fire or caused them to be set on fire). "He (meaning the plaintiff) has had two fires, and is a dangerous man to have on your premises" (meaning thereby that the plaintiff had upon two occasions wilfully set on fire his business premises, or had caused them to be set on fire, and was likely to do so again). *Held*, that the inuendo was insufficiently alleged to give a good cause of action.—*Jacobs v. Schmaltz*, 62 L.T. 121.

Solicitor :-

(ii.) **C. A. & Ch. D.—Agency Business—Share of Costs.**—Where a London solicitor does business for a country solicitor on the "usual agency terms," he is entitled to disbursements out of pocket, and half the "profit charges," whether the client pays them to the country solicitor or not, but not to any share in any other profit made by the country solicitor out of the business. W., a country solicitor, agreed with L., a London solicitor, that L. should act as his agent on the usual agency terms, and it was also agreed that as to the business connected with the X. company, W. was not to be called on to pay the bills of costs until he had himself been paid by the company. The company failed to pay the bills for many years, after which W. recovered the costs with interest by legal proceedings. *Held*, that L. was not entitled to any share in such interest.—*Ward v. Lawson*; *Lawson v. Ward*, L.R. 43 Ch. D. 353; 62 L.T. 158; 38 W.R. 300.

(iii.) **Ch. D.—Charging Order for Costs—Application to Raise Charge by Sale—Service on Parties Interested—Substituted Service.**—An action was commenced for the execution of the trusts of a settlement. The solicitor for all the beneficiaries except one obtained an order charging the real estate comprised in the settlement with his costs, and giving liberty to apply for a sale to raise them. He took out a summons for a sale, which was not served on the remaining beneficiary who was not a party to the action or the charging order. *Held*, that the order for sale could not be made without notice to such beneficiary. As his address was not known, substituted service by means of advertisements was allowed.—*Rowley v. Southwell*, 61 L.T. 805.

(iv.) **Q. B. D.—Striking Off Rolls—Suspension—Conviction—New Application.**—A solicitor was suspended for eighteen months for embezzlement. He was afterwards convicted of the felony and imprisoned. An application was made to strike him off the rolls on the ground of such conviction. *Held*, that there is no absolute rule that a solicitor convicted of a felony must be struck off the rolls, and that no further punishment should be inflicted.—*E. p. Incorporated Law Society; in re A Solicitor*, 61 L.T. 842.

Stock Exchange :—

(i.) **Q. B. D.—Custom—Broker—Right to Close Account.**—The custom on the Stock Exchange that, where a principal fails after due notice to pay his broker the balance due on an account, the broker is entitled to close the whole of the open transactions of the principal, is reasonable, and valid in law.—*Davis v. Howard*, 59 L.J. Q.B. 183.

Trade Mark :—

(ii.) **Ch. D.—Descriptive Word—“Invented Word”**—*Patents, &c., Act, 1888, s. 10, sub-s. 1 (v) (e).*—The word “Satinine” applied to articles which give a glossy surface, is a descriptive word and not capable of registration as a trade-mark. *Sebile*, it is not an “invented word.”—*In re Meyerstein’s Trade-Mark*, 38 W.R. 440.

(iii.) **Ch. D.—Infringement—Registration for one Class of Goods—Use for Another.**—The right of action for improper use of a trade-mark is limited to the particular class of goods in respect of which it is registered.—*Hart v. Colley*, 38 W.R. 440.

Trustee :—

(iv.) **Ch. D.—Investment—Power—Corporation—Trust Investment Act, 1889, ss. 3, 5, 6, 7, 9.**—A corporation holding a fund on trust for charitable purposes is entitled to invest trust moneys in hand on any securities authorised by the statute, unless expressly forbidden to do so by the instrument creating the trust. Unless a trustee has under his trust deed power to vary securities, he cannot sell existing investments for the purpose of re-investing on securities authorized by the statute.—*Manchester Royal Infirmary v. A.-G.*, L.R. 43 Ch.D. 420; 38 W.R. 460.

(v.) **Ch. D.—Improper Investment—Sale of Trust Funds—Liability to Replace.**—Where trustees sold stock, part of their trust funds, for the purpose of investing on a contributory mortgage, which was held to be an improper investment, but on which no loss resulted, *held*, that the sale was also improper, and that the trustees were liable, at the option of the beneficiaries, to replace the stock sold, or to repay the proceeds of sale.—*Clark v. Trellauny*, 59 L.J. Ch. 107.

Vendor and Purchaser :—

(vi.) **Ch. D.—Contract—Specific Performance—Letters.**—A. wrote to X. offering to sell a lease and goodwill at a certain price, the offer to remain open for ten days; X. accepted the offer. The solicitors to the parties prepared a formal memorandum, and X. wished to insert a clause restraining A. from carrying on business within a certain area. After some negotiations about this clause A., before the expiration of the ten days, withdrew his offer, and X. claimed specific performance of the contract contained in the two letters. *Held*, that the clause in question was a substantial addition to the contract; that the whole correspondence must be considered; that that shewed that the two letters were not intended to form a complete contract; and that specific performance must be refused.—*Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs*, 38 W.R. 398.

(vii.) **Ch. D.—Specific Performance—Statute of Frauds—Written Memorandum—Parol Evidence.**—To establish a sufficient memorandum within the Statute of Frauds parol evidence is admissible in order to connect together two written documents.—*Oliver v. Hunting*, 59 L.J. Ch. 255; 62 L.T. 108.

(i.) **Ch. D.—Restrictive Covenants—Power of Vendor to Depart From.**—The plaintiffs, in 1867, bought part of a building estate from trustees for sale subject to restrictive covenants, which provided that all the plots were sold subject to stipulations contained in a deed poll which had been executed by the trustees, and would be executed by each purchaser. The deed poll was executed by the trustees, and by sixty-six purchasers in all down to 1889. It recited that it was intended to be part of all future contracts for sale that the purchasers should be bound by the stipulations of the deed, and it witnessed that each purchaser covenanted with the other purchasers and the trustees to build, only one house or two semi-detached houses on each lot. Held, that the trustees were bound, either by actual covenant or express agreement, not to deal with the land in violation of the scheme. Injunction granted restraining them from authorising any purchaser to build contrary to the terms of the scheme.—*Mackenzie v. Childers*, L.R. 43 Ch. D. 265; 59 L.J. Ch. 188; 62 L.T. 98; 38 W.R. 243.

(ii.) **Ch. D.—Rescission—Defective Title—Conveyance.**—The trustees of a will were directed to sell certain freeholds after the death of A., the tenant for life. In the lifetime of A., and with his consent, they contracted to sell the freeholds “as trustees for sale.” The purchaser objected that they had no power to sell. The trustees offered him a conveyance by the tenant for life under the Settled Land Acts. The purchaser declined to enter into a fresh contract, and repudiated the contract. Held, on a summons by the purchaser, that he was entitled to have the contract rescinded, and to have his deposit returned with interest at 4 per cent., and also to have the costs of investigating the title.—*In re Bryant and Culliford to Barningham*, 62 L.T. 53.

See Colonial Law, p. 73, iv.

Voluntary Settlement:—

(iii.) **Ch. D.—Addition to Fund Settled by Will—Erroneous Impression as to Construction of Will.**—Where the trustees of a will voluntarily added to the settled share of a beneficiary under an erroneous impression as to the true construction of the will, and the will was subsequently construed by the Court adversely to their impression; held, that they held the fund so added on the trusts of the will as declared by the Court, not on the trusts as understood by the donors.—*Neison v. Walters*, 61 L.T. 872.

Waterman:—

(iv.) **Q. B. D.—Acting as Waterman for Hire or Gain.**—A labourer who, by his employer's orders, rows his fellow labourers to a ship lying in the Thames, and receives no payment for so doing beyond his usual wages, does not incur a penalty for working a boat for hire or gain, under the Watermen's and Lightermen's Amendment Act, 1859, sec. 54.—*Skittrell v. Showell*, 59 L.J. M.C. 56; 61 L.T. 874.

Waterworks:—

(v.) **Q. B. D.—Constant Supply—Prevention of Waste—Apparatus.**—By a local Waterworks Act, passed in 1858, all persons supplied with water were required to provide proper ball or stop-cocks or other necessary apparatus for regulating the supply for the prevention of waste; and in case of any person neglecting after notice to provide the same, the water company were empowered to cut off his supply. At that

date the supply was intermittent. By another Act, passed in 1888, the company were required to provide a constant supply. It then became necessary for the prevention of waste, that a valve should also be provided. Held, that the company could not justify cutting off the supply of a person who neglected after notice to provide such valve.—*Ward v. Folkestone Waterworks Company*, L.R. 24 Q.B.D. 334; 62 L.T. 321; 38 W.R. 426.

Weights and Measures:—

(i.) **Q. B. D.**—*False Weights—Property of Post-Office—Jurisdiction of Justices—Weights and Measures Acts, 1878, ss. 25, 59.*—An information was laid against the master of a post-office, who also traded as a baker on the same premises, for having in his possession for use in trade an unjust scale. The scale belonged to the post-office. Held, that the Justices had no jurisdiction to hear the information.—*Reg. v. Justices of Kent*, L.R. 24 Q.B.D. 181; 59 L.J. M.C. 51; 62 L.T. 114; 38 W.R. 253.

Will:—

(ii.) **Ch. D.**—*Construction—Condition—Marriage with Consent.*—Where a testator attaches, as a condition to the enjoyment of property given by his will, that the beneficiary shall, if he marry, do so with the consent of trustees, but prescribes no particular form of consent, the Court will hold that the condition has been satisfied if the consent has been given substantially, though not formally.—*Keeling v. Smith*, 62 L.T. 181; 38 W.R. 380.

(iii.) **Ch. D.**—*Construction—Devise of Lands at G.*—A testator devised all the lands situate at G. to which he was or should be entitled at the time of his death to X. At the date of the will he had about 135 acres of land in the parish of G., after that date he bought 11 acres more land in the parish of G., and about 430 acres of land in adjoining parishes, all adjoining the land formerly owned by him. Held, that the whole of such land passed under the devise.—*Townson v. Harrison*, 61 L.T. 762.

(iv.) **Ch. D.**—*Construction—Forfeiture on Alienation—Absolute, Life, and Contingent Interests—Annulment of Bankruptcy.*—A testator by will gave absolute interests, contingent life interests, and immediate life interests. There was a proviso that if by any act or default, or by operation of law, the interest of any beneficiary should be aliened, charged, or disposed of, then the interest should go over. Held (1), that the clause was void for repugnancy with respect to the absolute interests; (2) that it was not applicable to a contingent life interest, where the donee having been a bankrupt at the testator's death, the bankruptcy was annulled before the interest vested; (3) that the annulment of the bankruptcy and section 81 of the Bankruptcy Act, 1883, did not prevent the clause taking effect on an immediate life interest given to the bankrupt. Semble, that if the bankrupt was in a position to claim annulment of the bankruptcy as a matter of right before the immediate life interest became payable, the forfeiture clause would not have operated.—*Metcalfe v. Metcalfe*, 59 L.J. Ch. 159; 61 L.T. 767; 38 W.R. 397.

(v.) **C. A.**—*Construction—Remoteness—Originating Summons—R.S.C., 1883, O. IV., r. 3.*—H. devised real estate on trust for M. for life, then to M.'s children successively for their lives, then to E. and her children successively for their lives, and after the death of M. and E. and all

their children on such trusts as the longest livers of M., E., and their children should by will appoint. M. and E. survived the testatrix. Held, that the power of appointment by will was void, as the person to exercise it was not necessarily ascertainable within a life or lives in being and twenty-one years. Held, also, that there was jurisdiction to decide the question on an originating summons by the trustees of the will, the heir-at-law of H. and the appointee having both claimed the property.—*Midgley v. Tatley*, L.R. 48, Ch. D. 401.

- (i.) **H. L.**—*Construction—Resulting Trust*.—A testator devised to E. all his real estate “in trust nevertheless to pay thereout” certain debts, “and also in trust to pay” annuities to M., C., and A. He bequeathed his personality to M., C., E., and A., and appointed E. sole executor. Held, that E. did not take the real estate as a bare trustee, and that there was no resulting trust for the heir-at-law.—*Croome v. Croome*, 61 L.T. 814.
- (ii.) **Ch. D.**—*Construction—Vested or Contingent*.—Bequest of a leasehold house on trust to permit E. to receive the rent for her life and “from and after her decease” on trust for all her children in equal shares as tenants in common “on their respectively attaining the age of twenty-one.” There was a trust declared of the residue, but there was no direction as to the application of the rent of the house after E.’s death and during the minority of her children. E. survived the testator, and had one child who survived her but died under twenty-one. Held, that the child did not take a vested interest in the house.—*Jobson v. Richardson*, 59 L.J. Ch. 245; 62 L.T. 148.
- (iii.) **Ch. D.**—*Substitutionary Gift—“Descendants.”*—A. by will directed his son to insure his life for £5,000, and to bequeath that sum to his wife for life, and at her death, or at the death of the son to bequeath the sum to A.’s daughters or their descendants in equal proportions. The direction being held to be a declaration of trust, held, (1) that it was a substitutionary gift to the descendants of those of A.’s daughters who died in the lifetime of the son’s wife leaving descendants; (2) that “descendants” included children, grandchildren, and great-grandchildren living at the time of distribution; and (3) that though the daughters were to take as tenants in common, the descendants were to take as joint tenants.—*Matheson v. Goodwyn*, 62 L.T. 216.
- (iv.) **C. A.**—*Execution of Power of Appointment—Wills Act, s. 27*.—Decision of Ch. D. (see Vol. 15, p. 25, iv.) affirmed.—*Phillips v. Cayley*, L.R. 43 Ch. D. 222; 69 L.J. Ch. 177; 62 L.T. 86; 38 W.R. 241.
- (v.) **Ch. D.**—*Legacy Duty—Partnership Property—Real Estate—Conversion*.—The testator, who was domiciled in England, had carried on the business of sheep-breeding in partnership in New Zealand, part of the partnership property consisting of real estate. By articles of partnership in 1879 it was agreed that the real estate should be sold. It was not sold, and the testator died in 1880. He devised his shares in the real estate on trust for sale. Held, that the testator’s interest in the land, whether regarded as a share in land agreed by the articles of partnership to be sold, or as a share in partnership property, was personal and moveable property, and was subject to legacy duty according to the law of his domicil.—*Stokes v. Ducroz*, 62 L.T. 176.
- (vi.) **P. D.**—*Executors according to the Tenor*.—A testator did not specifically appoint any executor but nominated four persons to act as his trustees, and bequeathed to them his residue, with power to receive and give a discharge for any sum belonging to the residue. The will contained directions to “my executors” as to payment of debts, and as to the

manner in which they were to deal with the residue and other portions of the estate. *Held*, that the trustees were executors according to the tenor, and entitled to probate.—*In the Goods of the Earl of Leven and Melville*, L.R. 15 P.D. 22.

(i.) **P. D. — Probate—Executors according to the Tenor.**—A testator appointed A. and B. trustees of his will. He devised and bequeathed to them all his estate on trust to pay a certain debt, which was his only debt except his doctor's bill. They were then directed to pay a legacy and invest the residue, and pay an annuity out of the interest. Subject to such directions the residue was, in effect, given to B. A. and B. applied for probate as executors according to the tenor. *Held*, that they were not entitled to probate. Administration with the will annexed granted to them.—*In the Goods of Armstrong*, 59 L.J. P. 28 ~~22~~ L.T. 184.

Quarterly Digest

of

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR MAY, JUNE AND JULY, 1890.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **C. A. & P. D.—Grant—Creditor—Claim Sounding in Damages.**—The intestate had promised A. that if she would live with him and take care of him he would leave her his whole property. She lived with him, but left his house in consequence, as she alleged, of improper proposals made by him. She now applied for letters of administration. *Held*, that her claim was not a liquidated debt, but a claim sounding in damages, and that she must establish her claim and its amount before she could have a grant of administration as a creditor.—*In the goods of Cloak*, L.R. 15 P.D. 182; 62 L.T. 607.
- (ii.) **P. D.—Grant ad Colligendum—Powers of Administrator.**—Under a grant *ad colligendum* made to the Solicitor to the Treasury, the Court gave leave to the administrator to pay pressing claims for rent, rates, and taxes, to take the accounts of the manager of the intestate's business, and to dispose of the business. *Quare*, whether the grant does not confer authority upon the administrator to perform such acts without special leave.—*In the goods of Oddy*, 62 L.T. 643.
- (iii.) **P. D.—Grant of—Guardian ad Litem of Infant Child—Legitimacy Disputed.**—An intestate's estate was being administered in the Chancery Division. An infant child of the intestate claimed to be his next-of-kin, but her legitimacy was disputed. The judge appointed X. guardian *ad litem* of the infant, for the purpose of applying for letters of administration. His only function would be to hand over the property to the Chancery Division. Grant made to X. in the usual form.—*In the goods of Mustapha*, 69 L.J. P. 61; 62 L.T. 606.
- (iv.) **P. D.—Grant to Official Receiver—Sundries.**—Where letters of administration to the estate of a deceased intestate were granted to the chief official receiver in bankruptcy, the Court required him to give the usual administration bond, but dispensed with the usual sundries.—*In the goods of Cope*, L.R. 15 P.D. 107; 62 L.T. 600; 88 W.R. 688.

(i.) **P. D.**—*No Known Relatives—Grant to Creditor.*—A woman died intestate without any known relatives, and it was impossible to ascertain whether she was ever married, or, if married, whether her husband survived her. The Court made a grant *ad colligendum* to an unsecured creditor, and accepted the affidavit of his solicitor that “he was informed and verily believed that she died a widow without any known relations, and intestate.”—*In the goods of Ashley*, L.R. 15 P.D. 120.

(ii.) **C. A.**—*Creditor—Contingent—Annuitant—Insolvent Estate—Right to Take Proceedings.*—An annuitant under a covenant in an annuity deed whose annuity is not in arrear, has, together with other contingent creditors, no right to institute proceedings for the administration of the covenantor's estate, although the capitalised value of the annuity at the death of the covenantor would, if reckoned among the liabilities of his estate, have the effect of making the estate insolvent.—*Dicks v. Hare*, L.R. 44 Ch. D. 236; 59 L.J. Ch. 375.

(iii.) **Ch. D.**—*Legacies out of Sale Money—Deficiency—Lapse of One Legacy—Abatement.*—A testatrix bequeathed chattels on trust to sell, and pay out of the proceeds two legacies of definite amounts; there was no gift of surplus sale moneys. The sale moneys were not sufficient to pay both legacies. One of the legacies lapsed. Held, that the other legacy was not liable to abate in favour of the residuary legatee.—*Raikes v. Raikes*, 38 W.R. 636.

(iv.) **C. A.**—*Will of Married Woman—Suit by Husband against Executor.*—Decision of Ch. D. (see Vol. 14, p. 25, iii.) reversed.—*Smart v. Tranter*, L.R. 43 Ch. D. 587; 59 L.J. Ch. 363; 62 L.T. 356; 38 W.R. 530.

Adulteration:—

(v.) **Q. B. D.**—*Exposure for Sale—Label—Margarine Act, 1887, s. 6.*—A person asking in a shop for margarine was served from a parcel of margarine in the shop which was unlabelled, but which was placed behind a screen and was not visible to customers. Held, that it was not “exposed” for sale, so as to subject the vendor to a penalty for exposing it for sale without a label.—*Crane v. Lawrence*, L.R. 25 Q.B.D. 162; 38 W.R. 620.

Advancement:—

(vi.) **Ch. D.**—*Parent and Child—Presumption—Resulting Trust.*—A father, wishing to provide an occupation for his eldest son, purchased in the son's name shares in three companies to qualify him as a director of the companies. In two of the cases the shares were largely in excess of the number necessary for such qualification. The son, who received a liberal allowance from his father, voluntarily paid over the dividends to the father. The certificates of the shares were afterwards handed to the father for safe custody, and after his death were found in three envelopes, two of which he had endorsed “belonging to me.” Held, that the object of the purchase of the shares in the son's name was merely to qualify him as a director, that the presumption of advancement was rebutted, and that there was a resulting trust of the shares for the father.—*Gooch v. Gooch*, 62 L.T. 384.

Agreement:—

(vii.) **Ch. D.**—*Construction—Agreement not to “Engage in Business.”*—S. entered into a written agreement of service with W., a general draper and haberdasher, and agreed not to “engage in a similar business” within half-a-mile of W.'s premises for six months after leaving the same. S. left W.'s service, being at the time a buyer in one of the departments

at a salary, and immediately took a post at a salary in a similar department with a universal purveyor next door. *Held*, without defining the meaning of the words "engage in a similar business," that S. had broken his agreement, and must be restrained by injunction.—*Watts v. Smith*, 62 L.T. 458.

Arbitration:—

(i.) **Ch. D.—Award—Ultra Vires—New Contract.**—B. contracted to supply H. with tinned salmon, "allowances as customary to be settled on result of examination." Any dispute to be settled by arbitration. B. tendered tins each labelled "1 lb." There was a dispute as to the weight, and an arbitration took place. The umpire decided that the salmon was a fair tender, that the weight was "irregular and unusually deficient," and awarded an allowance to H. of more than three times the "customary allowance." *Held*, that the award was bad on the face of it, that it amounted to forcing a new contract on H., and was invalid and must be referred back for re-consideration.—*Hooper v. Balfour*, 62 L.T. 646.

(ii.) **Ch. D.—Stay of Legal Proceedings—Discretion—Arbitration Act, 1889, ss. 4, 19.**—The Court has a discretion as to staying legal proceedings brought by one party to a submission to arbitration against the other party. Partnership articles provided for the reference of disputes to arbitration. The executors of one partner brought an action against the others claiming a sum of money as due to their testator's estate. The defendants took out a summons that all proceedings in the action might be stayed and the matter referred to arbitration. The Court, being of opinion that the matter in dispute was one of law arising on the construction of the articles, ordered the summons to stand over till the defence had been delivered, in order that the Court might then be applied to to decide any question of law raised by the pleadings, before referring, if necessary, any matters of account to an arbitrator.—*Clegg v. Clegg*, L.R. 44 Ch. D. 200; 38 W.R. 638.

See Practice, p. 128, vii. Scotch Law, p. 137, v.

Attachment:—

(iii.) **C. A.—Judgment Debtor—Protection.**—Decision of Q. B. D. (see Vol. 15, p. 2, i.), affirmed.—*Mitchell v. Simpson*, L.R. 25 Q.B.D. 183; 38 W.R. 565.

(iv.) **P. D.—Divorce—Alimony—Non-Payment.**—The Court will not grant an attachment for disobedience of an order for permanent alimony, by non-payment of the same.—*De Lossy v. De Lossy*, L.R. 15 P.D. 115; 62 L.T. 704; 38 W.R. 511.

(v.) **Ch. D.—Trustee—Order to Pay into Court—Non-compliance—Bankruptcy—Bankruptcy Act, 1883, s. 9.**—The defendant was ordered as a trustee to pay money into Court. He failed to do so. A receiving order was subsequently made against him on his own petition, and he had not obtained his discharge. *Held*, that there was no jurisdiction to attach him for failure to comply with the order.—*Simes v. Newberry*, 62 L.T. 721; 38 W.R. 570.

Bailment:—

(vi.) **Q. B. D.—Denial of Bailor's Title—Estoppel.**—A bailee is estopped from disputing his bailor's title unless he claims to defend under the authority of the person in whom he alleges the title to be.—*Rogers v. Lambert*, L.R. 24 Q.B.D. 573; 59 L.J. Q.B. 259; 62 L.T. 694; 38 W.R. 542.

Banker:—

(i.) **Ch. D.—Loan—Deposit of Securities—Enquiry as to Title—Damages.**—Where a banker makes an advance to a customer, being a stockbroker, on the deposit of negotiable securities to bearer, he is bound to enquire into the title to the securities. Where in such a case the title of the banker failed in an action against him by the plaintiff, the real owner, who had bought the securities merely to sell again at a favourable opportunity, and the value had fluctuated while the securities were held by the banker; held, that it could not be presumed that the plaintiff would have realised at the highest price, and that, as regards such of the securities which the banker had sold before the plaintiff's demand, he was liable for the price received with interest, and, as regards those still in his possession, which had depreciated, for the difference between their value at the date of the plaintiff's demand, and the date of the judgment, with any dividends received in the meantime.—*Simmonds v. London Joint Stock Bank; Little v. Same*, 62 L.T. 427.

Bankruptcy:—

(ii.) **C. A.—Act of Bankruptcy—Assignment for Benefit of Creditors.—Bankruptcy Act, 1883, s. 4, sub-s. 1 (a) (b).**—The debtor, at the instance of creditors, wrote to an auctioneer whom he had previously instructed to sell certain effects which constituted practically the whole of his property, authorising him to pay the proceeds of sale to the joint account of certain persons, who were to hold it for the benefit of his Creditors. Held, that this was not an act of bankruptcy.—*E. p. May; in re Spackman*, 38 W.B. 497.

(iii.) **C. A.—Act of Bankruptcy—Conveyance of Debtor's Property—Fraudulent Transfer—Bankruptcy Act, 1883, s. 4, sub-s. 1.**—A "conveyance or assignment" of a debtor's property in order to constitute an act of bankruptcy, must be a conveyance or assignment properly so called; a declaration of trust, or other mode of disposition not properly a conveyance or assignment, will not suffice. A "fraudulent" conveyance, gift, delivery, or transfer, in order to constitute an act of bankruptcy, must be a conveyance, gift, delivery, or transfer with a fraudulent intent.—*E. p. Foley; in re Spackman*, L.R. 24 Q.B.D. 728; 59 L.J. Q.B. 306.

(iv.) **Q. B. D.—Discharge—Conditional—Bankruptcy Act, 1883, s. 28.**—On an application by a bankrupt for his discharge, the official receiver reported four offences against him. The County Court Judge refused an absolute discharge, but gave liberty to apply when a dividend of 1s. in the pound had been paid in addition to 10s. in the pound already paid. Held, on appeal by the bankrupt, that the order was a lenient one, and ought not to be interfered with.—*E. p. Tregaskis; in re Tregaskis*, 62 L.T. 605.

(v.) **C. A.—Discharge—Conduct of Bankrupt—Discretion of Court—Bankruptcy Act, 1883, ss. 24, 28, sub-ss., 2, 3, 5, 6.**—In exercising its discretion as to granting a bankrupt his discharge, the Court may take into consideration any conduct of the bankrupt connected with or relevant to the bankruptcy, and is not limited to the matters mentioned in sections 24 and 28 of the Bankruptcy Act.—*Constable, s. p.; in re Barker; Jones, s. p.; in re Jones*, 59 L.J. Q.B. 381; 38 W.R. 609.

(vi.) **Q. B. D.—Discharge—Offences—Bankruptcy Act, 1883, s. 28.**—It is not advisable to suspend a debtor's discharge for three or six months; such a punishment being more than nominal, yet not sufficiently severe to be deterrent. Where a debtor had been guilty of a fraudulent

preference, and of selling his business with the knowledge of his insolvency, held, that an order which suspended his discharge till he should pay a dividend which it was exceedingly improbable he would ever be able to pay, was too severe, and that a suspension for three years was proper.—*E. p. Freeman*; *in re Freeman*, 62 L.T. 367.

(i.) **Q. B. D.**—*Discharge—Second Application for*.—Where a bankrupt has been refused his discharge, and wishes to apply for it a second time, the application being founded on facts which were or might have been before the judge on the original hearing, he must apply for a review of the judgment. The application must not be *ex parte*, and the applicant must make out a *prima facie* case for review before the other side is called on to make any answer. *Sembler*, that if the discharge was refused on the ground of the bankrupt's misconduct, he may apply again at a subsequent period if he can shew that he has during that time displayed qualities, the absence of which lost him his discharge on the first occasion.—*E. p. Lloyd*; *in re Lloyd*, 62 L.T. 366.

(ii.) **C. A.**—*Property Acquired after Bankruptcy—Assignment of—Validity—Bankruptcy Act, 1883, s. 44*.—An undischarged bankrupt, who was suing for the wrongful conversion of goods acquired by him during the bankruptcy, assigned the cause of action for value to the plaintiff, who knew that he was an undischarged bankrupt. The bankrupt recovered a verdict, and the plaintiff claimed the amount thereof before it was paid over, and before the trustee in bankruptcy claimed it. *Held*, that the assignment having been *bona fide* on the part of the plaintiff, and having been completed before the trustee intervened, was good as against the trustee.—*Cohen v. Mitchell*, 38 W.R. 551.

(iii.) **C. A.**—*Receiving Order—Prior Foreign Bankruptcy—Domicil*.—A firm which had its head office in Paris, had its branch office and large assets in England. It was declared bankrupt in France, and a syndic appointed to administer the estate. A bankruptcy petition was afterwards presented, and a receiving order made in England. The syndic then applied to stay proceedings. There was no evidence of the domicil of the members of the firm. *Held*, that the receiving order was rightly made, and further, that the existence of a prior bankruptcy in a foreign country, not shewn to be the country of domicil of the debtors was no ground for staying proceedings. *Quere*, whether the syndic had any *locus standi* to make the application.—*E. p. Chdale*; *in re Artola Hermanos*, L.R. 24 Q.B.D. 640; 59 L.J. Q.B. 264.

(iv.) **C. A.**—*Secured Creditor—Lien of Company on Shares—Bankruptcy Act, 1883, ss. 6, 168*.—The articles of a company provided that the company should “have a first and paramount lien on all shares for all moneys due to the company from the registered holder thereof, or other the persons for the time being entitled thereto against the company.” A., who owed money to the company, had obtained judgment against a registered shareholder, declaring that he was trustee for A. of some of his shares. *Held*, that as the company was not bound to recognise trusts of his shares, A. was not entitled to the shares “as against the company,” and that consequently the company had no lien on the shares, and were not “secured creditors” of A.—*E. p. Mexican Santa Barbara Mining Co.*; *in re Perkins*, L.R. 24 Q.B.D. 618; 59 L.J. Q.B. 226.

(v.) **C. A.**—*Service of Notice or Petition—Substituted*.—An order for substituted service of a bankruptcy notice or petition may be made, notwithstanding that the debtor is out of the jurisdiction, if the Court is satisfied that he went out of the jurisdiction, to avoid service.—*E. p. Urquhart in re Urquhart*, L.R. 24 Q.B.D. 728; 38 W.R. 612.

(i.) **Q. B. D.—Solicitor—Counsel's Fees—Payment.**—A counsel applied that the trustee in bankruptcy of a solicitor might be directed to pay certain counsel's fees alleged to have been received by him in respect of the bankrupt's bills of costs in certain matters. The trustee alleged that the bankrupt had made payments to the applicant on a general account, which included the fees claimed, and also that the trustee had agreed with the clients to accept a lump sum in settlement of the bills of costs, exclusive of counsel's fees. Held, that it must be referred to the registrar to report what fees had been received by the trustee, and whether any of them had been paid by the bankrupt to the applicant, the applicant to be at liberty, on the registrar's finding, to raise the question whether it was competent for the trustee to arrange with the client of the solicitor to accept a less sum than was claimed by a bill of costs after deducting counsel's fees.—*E. p. Colquhoun; in re Clift*, 38 W.R. 688.

Bill of Sale:—

(ii.) **C. A.—Bills of Sale Act, 1878, s. 4—Pretended Sale of Goods—Hiring Agreement—Power to go Behind Form of Document.**—A transaction purported to be a sale of goods, followed by an agreement in writing by which the alleged purchaser let them on hire to the alleged vendor, with power to the alleged purchaser to retake possession in certain events. The real nature of the transaction was one of loan on the security of the goods. Held, that the Court had power to go behind the form of the document, and inquire into the real nature of the transaction, and that the agreement was a bill of sale, being "a license to take possession of personal chattels as a security for a debt."—*E. p. Official Receiver; in re Watson*, L.R. 25 Q.B.D. 27; 38 W.R. 567.

(iii.) **Q. B. D.—Description of Goods—Sufficiency—Bills of Sale Acts, 1878 & 1882.**—Stock comprised in a bill of sale were described in the schedule as, "Roan horse, 'Drummer,'"; "Brown mare and foal"; "Three ravel carts." Held, that the horse and mare were sufficiently described, and that in the absence of evidence shewing want of identification of the particular carts, the carts were also sufficiently described.—*Hickey v. Greenwood*, 38 W.R. 686.

(iv.) **C. A.—Validity—Statutory Form—Chattels Real—Bills of Sale Amendment Act, 1882.**—The Bills of Sale Acts only contemplate advances on the security of chattels personal. Accordingly, a bill of sale which together with chattels personal, comprised "all the tenant-right, valuation, and goodwill, tillages, and interest of the mortgagor," in a certain farm, which interests were further specified in the schedule together with the chattels personal, was held to be void, for want of conformity with the statutory form.—*Cochrane v. Entwistle*, L.R. 25 Q.B.D. 116; 38 W.R. 537.

(v.) **Q. B. D.—Validity—Witnesses—Address and Description—Rate of Interest.**—A bill of sale which does not state the addresses and descriptions of the attesting witnesses, is void for want of conformity with the statutory form, although such addresses and descriptions are stated in the affidavit filed with the registrar. A bill of sale which secured a loan of £50 and "interest thereon at the rate of £7 10s. for three years," and provided for the repayment of the principal and interest in equal monthly instalments, held, void for want of conformity with the statutory form, for not specifying the rate of interest charged.—*Blankenstein v. Robertson*, L.R. 24 Q.B.D. 548; 59 L.J. Q.B. 315; 62 L.T. 782.

Building Society:—

(i.) **Ch. D.—Dissolution—Consent of Members—Withdrawing Members—Building Societies' Act, 1874, s. 32 (3).**—In estimating the statutory majority of members, whose consent is required to enable a building society to dissolve by consent, withdrawing members must be counted as members, notwithstanding a rule of the society to the effect that a member who had given notice of withdrawal should thenceforth take no part in the affairs of the society.—*Sibun v. Pearce*, 62 L.T. 388.

Bye-Law.—See Commons Conservators, p. 110, i.

Carrier:—

(ii.) **H. L.—Liability for Damage—“Terra-Cotta Busts”—“Statuary.”**—A. asked X. to quote a rate for carriage of goods consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, &c. X. quoted a rate for “alabaster goods, furniture, &c., but not for goods described as statuary.” A. wrote, “You seem to make a difference between marble busts and columns and alabaster. Please let us know about this.” X., in reply, wrote that the rate quoted did not cover insurance risks, but was simply for freight, and gave no answer to the question about the difference between marble busts, columns, and alabaster. A. handed to X. for carriage goods described by A.’s agent as cases of “terra-cotta bronzed.” The goods were damaged in transit, and A. sued X. for damages. There was conflicting evidence as to whether the goods were “statuary.” Held, that the exception of insurance risks did not discharge X. from his liability as an ordinary carrier; and that X. had failed to prove that “terra-cotta busts” came within the exception of “goods described as statuary.”—*Sutton v. Ciceri*, L.R. 15 App. Cas. 144; 62 L.T. 742.

Charity:—

(iii.) **Ch. D.—Bequest—Validity.**—Testator gave a legacy to trustees on trust to apply the same “for the advancement and propagation of education in economic and sanitary science in Great Britain.” Held, to be a valid charitable bequest.—*Berridge v. Turner*, 62 L.T. 365.

Chemist:—

(iv.) **Q. B. D.—Unregistered Assistant—Sale of Poison—Penalty—Pharmacy Act, 1868, s. 16.**—An unregistered assistant to a duly registered chemist, who, in his employer’s absence, sells poison, is liable to a penalty, though the sale is made on behalf of such employer.—*Pharmaceutical Society v. Wheeldon*, L.R. 24 Q.B.D. 683; 62 L.T. 727.

Colonial Law:—

(v.) **P. C.—Western Australia—Registration of Title—Powers of Commissioner.**—By the Transfer of Land Act, 1874, section 19, the Commissioner of Titles is directed, upon certain conditions as to encumbrances having been complied with, to advertise an application for the registration of a title, and to serve notices on persons affected, and to appoint a time after which he is to register the title “unless a caveat shall be served forbidding the same.” Held, that such conditions having been complied with, and after such advertisement and service of notices, and after the expiration of the appointed time, the Commissioner still had a discretion to refuse to register the title, should any further information casting doubt on the title come to his knowledge.—*Manning v. Commissioner of Titles*, L.R. 15 App. Cas. 195; 62 L.T. 378.

See *Railway*, p. 185, iii.

Commons Conservators :—

(i.) **Ch. D.—Wimbledon and Putney Commons Act, 1871—“Tenant or Occupier”—Bye-Law.**—The conservators of Wimbledon Common were required by statute to be elected, and it was provided that any person who was “tenant or occupier of a dwelling house” of the annual rateable value of £35 or upwards should be qualified as an “elector.” The conservators had power to make bye-laws, and one of their bye-laws provided that no person not being on the list of voters should vote at the election. R. and X. occupied a house as joint tenants, at an annual rent of £300. X. only was named in the rate books as ratepayer, and her name only appeared on the list of “electors.” Held, that R. was qualified as an elector, and that if the bye-law took away his right to vote it was *ultra vires*.—*Purves v. Wimbledon and Putney Commons Conservators*, 62 L.T. 529.

Common Lodging House :—

(ii.) **Q. B. D.—Penalty for Keeping—Charitable Institution—Non-registration—Common Lodging Houses Acts, 1851 & 1853.**—B. opened and kept a lodging house for the reception of male lodgers, who were charged a small sum at the discretion of the manager, but the house was not kept for the purpose of gain, but partly for charitable, and partly for religious purposes. The house was not registered, and had not been inspected by the officer of the local authority. Held, that the house was not a common lodging house within the meaning of the Acts, and that B. was not liable to a penalty.—*Booth v. Ferrett*, L.R. 25 Q.B.D. 87.

Company :—

(iii.) **Ch. D.—Directors—Fees—Misfeasance—Statement in Prospectus—Second Prospectus.**—The articles of a company provided that the directors should be remunerated by an annual salary. The prospectus stated that all expenses up to allotment were to be paid by the vendor. No shares were allotted on the faith of that prospectus. The directors continued to work the company, and issued a second prospectus which did not contain the statement above mentioned. Before the expiration of a year from the incorporation of the company, and before the allotment of shares, the directors voted themselves certain sums in respect of a quarter's salary. The company was afterwards wound-up. Held, (1) that the directors were not bound by the statement in the first prospectus, as no shares were allotted on the faith of it; (2) that the directors were not trustees for the creditors of the company; (3) that the directors, having acted *bond fide* in the interests of the company, were entitled to vote themselves remuneration before the expiration of a year.—*In re A. M. Woods Ships' Woodite Protection Co.*, 62 L.T. 760.

(iv.) **Ch. D.—Directors—Meetings—Notice.**—Out of four directors of a company two, D. and R., were absent at the same time. D. was resident in Canada, and had been appointed a director to secure his influence there, and was charged with duties which required his residence there. R. was travelling abroad, and his address was not known. Held, that during such absence of D. and R. it was not necessary for the validity of every board meeting that notice of the meeting should be sent to them, and that the other two directors were entitled to act as a board to bind the company.—*Halifax Sugar Refining Co. v. Francklyn*, 62 L.T. 563.

(v.) **Ch. D.—Insurance—Deposit—Payment Out—Amalgamation.**—In order to entitle a life assurance company to receive back the deposit made by it under section 8 of the Life Assurance Companies Act, 1870, the sum of £40,000 required by that section to be accumulated must have

been accumulated out of the premiums received on the policies of the company. The S. Co. agreed to amalgamate with the M. Co., which had accumulated a sum exceeding £40,000, and the policy-holders of the S. Co. had accepted the liability of the M. Co., but had not abandoned the liability of the S. Co. *Held*, that the S. Co. could not receive back its deposit until an additional accumulation of £40,000 had been made out of the premiums on the policies of the M. Co.—*E. p. Scottish Economic Life Assurance Society*, 38 W.R. 684.

- (i.) **Ch. D.—Reduction of Capital—Calls in Arrear—Form of Minute.**—A form of minute for registration was approved by the Court on the confirmation of a special resolution for the reduction of the capital of a company in a case in which calls on some of the shares were in arrear.—*In re American Pastoral Co.*, 62 L.T. 625.
- (ii.) **Ch. D.—Registration—Name Calculated to Deceive—Companies Act, 1862, s. 20.**—The plaintiffs were waxwork exhibitors under the name of Madame Tussaud & Sons (Limited). The defendant had formed a company under the name of Louis Tussaud (Limited), which proposed to carry on a similar exhibition near the plaintiff's exhibition. There was no evidence of intention to deceive the public apart from the similarity of name. The defendant had never carried on a similar exhibition on his own account. *Held*, that the name was calculated to deceive, and that the defendant must be restrained from registering his company.—*Madame Tussaud v. Tussaud*, 62 L.T. 633; 38 W.R. 508.
- (iii.) **C. A.—Uncalled Capital—Mortgage of—Power—Winding-up.**—Decisions of Ch. D. (see Vol. 15, p. 75, ii.) affirmed.—*In re Pyle Works, Limited*, 38 W.R. 674.
- (iv.) **C. A. & Ch. D.—Winding-up—Examination by Liquidator—Pending Proceedings—Companies Act, 1862, s. 115—Appeal.**—The liquidator of a company is not entitled as of right to an order for the examination of a person under section 115; the order may be granted or refused in the discretion of the Court. Where a liquidating company, being plaintiff in an action, had been refused discovery therein, and the liquidator attempted to obtain the discovery by means of a question in the examination of a person under section 115, which question the person refused to answer, *held*, by the Court of Appeal, that the person ought not to be compelled to answer the question, the information sought to be elicited not being required for the purposes of the winding-up. *Sembler*, that a person who is summoned to attend for examination by an order under section 115 has a *locus standi* to appeal from the order.—*In re North Australian Territory Co.*, 62 L.T. 556; 38 W.R. 561.
- (v.) **Ch. D.—Winding-up—Execution put in Force after Winding-up—Companies Act, 1862, ss. 85, 87, 163.**—The sheriff was in possession of the premises and chattels of a company at the date of the presentation of a winding-up petition. He received moneys paid by the public for admission after the commencement of the winding-up. *Held*, that as to these moneys the execution was put in force after the commencement of the winding-up, and was void.—*In re The Opera*, 38 W.R. 637.
- (vi.) **Ch. D.—Winding-up—Misfeasance—Savings Bank—Trustee and Manager—Savings Banks Act, 1863, s. 11—Companies Act, 1862, ss. 162, 200.**—D., a manager and trustee of a savings bank, failed to comply with the statutory rules as to the maintenance of checks and the audit and examination of accounts. Frauds were committed by the actuary of the bank which necessitated its winding-up. *Held*, that D. was not liable to contribute, being exempted from liability by section 11 of the

Savings Banks Act, 1863; but that his omission to comply with the rules constituted a misfeasance, and that he must therefore pay an adequate sum by way of compensation.—*In re Cardiff Savings Bank; Davies' Case*, 69 L.J. Ch. 450; 62 L.T. 628; 38 W.R. 571.

- (i.) **Q. B. D.**—*Winding-up—Shareholder—Calls—Debt due from Company.*—Where a company is in voluntary liquidation, a shareholder, who is sued by the liquidator for money due in respect of calls on his shares, is not entitled to set off a debt due to him from the company.—*Hoby & Co. v. Birch*, 59 I.J. Q.B. 247; 62 L.T. 404.
- (ii.) **Ch. D.**—*Winding-up—Shareholder's Petition—Just and Equitable Cause—Companies Act, 1862, ss. 79, 80.*—A banking company had a provision in the articles that one-half of the share capital was not to be called up except in the event of a winding-up. It had been in existence six years, had made no profits, and had lost practically the whole of the paid-up capital. Only 2,400 out of 100,000 shares had been issued. There were no debts. A shareholder petitioned for a winding-up, and was opposed by a majority of shareholders. Held, that there was just and equitable cause for a winding-up, the subject matter of the company having failed, and the shareholders being entitled to refuse to carry on business at the expense of the reserve fund, which they had contracted to contribute only in the event of a winding-up.—*In re Bristol Joint Stock Bank*, 62 L.T. 745; 38 W.R. 574.
- (iii.) **Ch. D.**—*Winding-up—Shareholder's Petition—Just and Equitable Cause.*—A company was formed for the purpose of carrying on a banking business at N. After a few months it closed its office at N., changed its name, and began a business consisting of speculation in stocks and shares. Held, on a petition by a shareholder, that it was "just and equitable" that the company should be wound-up.—*In re The Crown Bank*, 38 W.R. 666.
- (iv.) **Ch. D.**—*Winding-up—Two Petitions—Costs.*—A creditor who presents a petition to wind-up, with notice that a prior petition has been presented by the company, will have his petition dismissed with costs as against the company, although his petition was advertised first.—*In re Standard Portland Cement Co.*, 59 L.J. Ch. 408.
- (v.) **Ch. D.**—*Winding-up—Scheme of Arrangement—Secured Creditors—Surrender of Security—Joint Stock Companies' Arrangement Act, 1870, s. 2.*—The Court has power to sanction a scheme of arrangement which compels secured creditors of a company to surrender their securities and to accept shares in lieu thereof.—*In re Empire Mining Co.*, 59 L.J. Ch. 345; 62 L.T. 493.

See *Bankruptcy*, p. 107, iv.

Contract:—

- (vi.) **H. L.**—*Construction.*—By agreement in writing A. agreed to supply "the whole steel" required for the Forth Bridge. The agreement contained the clause, "The estimated quantity of steel, we understand, to be 30,000 tons more or less." Held, that A. was entitled to supply the whole of the steel required for the bridge, his right not being affected by the statement of the estimated quantity.—*Tancred & Co. v. Steel Company of Scotland*, L.R. 15 App. Cas. 125; 62 L.T. 789.
- (vii.) **C. A.**—*Illegal—Part Performance—Money Paid Under.*—Where money has been paid under an illegal contract which has been partly performed it cannot be recovered. The defendant was solicitor to the petitioning creditor in a bankruptcy, and was entitled to be paid certain costs out

of the estate, which had not been paid owing to deficiency of assets. The plaintiff, a friend of the bankrupt, paid the costs, on condition that the defendant should not appear at the public examination of the bankrupt, and should not oppose his discharge. The defendant, with his client's consent, did not appear at the public examination. The plaintiff brought an action to recover back the money before the discharge had been applied for. *Held*, that the part performance of the contract was a bar to the action.—*Kearley v. Thomson*, L.R. 24 Q.B.D. 742; 59 L.J. Q.B. 288; 38 W.R. 614.

(i.) **Ch. D.**—*Illegal Consideration—Compromise of Indictment for Nuisance.*—The defendant obstructed a highway by certain works and the plaintiffs indicted him. The parties agreed that, in consideration of the defendant restoring the highway the plaintiffs should consent to a verdict of "not guilty." The defendant having failed to restore the highway the plaintiffs sued for specific performance. *Held*, that the agreement was founded on an illegal consideration, and could not be enforced.—*Windhill Local Board v. Vint*, 62 L.T. 725.

(ii.) **Q. B. D.**—*Implied—Officers' Mess—Liability of Member.*—An individual member of an officers' mess, not having in any way pledged his credit, is not personally liable for goods supplied to the mess by the orders of the caterer.—*Hawke v. Cole*, 62 L.T. 658.

(iii.) **H. L.**—*Scotch Law—Reduction—Misrepresentation—Issues for Trial.*—A. made to X. an offer of his entailed estate at a certain price by a letter which contained the stipulation "The sale is made subject to the ratification of the Court." The offer was accepted. The offer and acceptance, according to their proper construction, constituted an absolute sale of the estate. A. sued for reduction of the contract, and asked for issues of essential error, and of essential error induced by the agent of X. He alleged that he was not aware of any mode of selling an entailed estate except one by which the Court judged of the sufficiency of the price; and also alleged that the agent of X. gave him a draft of the offer to copy and sign, representing that the effect of the letter would be "merely to give" X. "a little hold on" A. *Held*, that A. was entitled to the issue of essential error induced by the agent of X.; but that he was not entitled to the issue of essential error, as he could not claim to have the contract reduced merely because he understood it to be other than it really was.—*Stewart v. Kennedy* (No. 2), L.R. 15 App. Cas. 108.

Copyhold:—

(iv.) **C. A.**—*Common of Pasture—Inclosure by Lord—Sufficiency of Common.*—There were rights of common of pasture for sheep over the waste of a manor, a part of which the lord proposed to inclose. The commoners were entitled to turn out more sheep than the waste could carry, but, judging from the average number turned out in past years, it was not probable that as many as the waste could carry would ever be turned out. *Held*, that the question of sufficiency of common must be decided with reference to the number of sheep which the commoners were entitled to turn out, not with reference to the number they were accustomed to turn out; that there was insufficiency of common, and that the lord must be restrained from inclosing.—*Robertson v. Hartopp*, L.R. 43 Ch.D. 484; 62 L.T. 585.

Costs:—

(v.) **C. A.**—*Appeal as to—Discretion of Judge.*—Where a decree nisi for divorce made in favour of a wife was rescinded on the ground of collusion, and the Court below refused to order payment to her of a sum

deposited in Court to secure her costs, held, that there was no appeal from such refusal, the wife's costs of the original petition and those occasioned by the intervention of the Queen's Proctor being in the discretion of the Court.—*Butler v. Butler*, L.R. 15 P.D. 126; 62 L.T. 477.

- (i.) **P. D.—Damages against Co-respondent—Apportionment—Costs of.**—When a co-respondent has been condemned in the costs of a divorce suit, in which a verdict for damages has been given against him, he is liable for the costs of, and incident to, proceedings before the Registrar for the apportionment and settlement of such damages.—*Irwin v. Irwin*, 59 L.J. P. 58; 62 L.T. 612.
- (ii.) **P. D.—Decree *Nisi Rescinded*—Wife's Costs.**—Where, in a divorce suit, a decree *nisi* had been pronounced in favour of the wife, and had afterwards been rescinded on the intervention of the Queen's Proctor, on the ground of collusion, the Court refused to order a sum, which had been paid into the Registry by the husband to secure the wife's costs, to be paid out to her solicitors, or to order the husband to pay the costs incurred by the wife in consequence of the intervention of the Queen's Proctor. *Sembly*, it is not the practice in matters relating to divorce to order the husband to give security for his wife's costs of, and incidental to, the intervention of the Queen's Proctor.—*Butler v. Butler*, 59 L.J. P. 30.

County Council:—

- (iii.) **C. A.—Election—Elector Registered in more than One Division—Local Government Act, 1888, s. 7, sub-s.s. (1), (2), (4), (5)—Municipal Corporations Act, 1882, s. 44, sub-s. (1), s. 45, sub-s. (6), s. 51, sub-s. (2).**—Decision of Q. B. D. (see Vol. 15, p. 77, iv.) affirmed.—*Knill v. Towse*, L.R. 24 Q.B.D. 677; 38 W.R. 521.

County Court:—

- (iv.) **P. D.—Appeal from—Admiralty Jurisdiction—Interlocutory Order—County Courts Admiralty Jurisdiction Act, 1868, s. 26—County Courts Act, 1888, s. 120—Costs of Witnesses not called—County Court Rules, 1889, O. 1., r. 16.**—There is no appeal except by leave of the judge from an interlocutory decree or order of a county court having admiralty jurisdiction in an admiralty cause, when such decree or order is not made at the hearing of the suit. *Sembly*, that a county court judge may not order, as a general rule of practice, that in admiralty causes the costs of witnesses not called shall be disallowed, unless he should otherwise order.—*The Cashmores*, L.R. 15 P.D. 121; 59 L.J. P. 57; 38 W.R. 623.
- (v.) **Q. B. D.—Defendant Residing out of Jurisdiction—Waiver of Objection.**—A County Court summons was issued and served on a defendant who resided out of the jurisdiction of the Court, without leave having been first obtained. The defendant appeared, but objected to the jurisdiction after one of the causes of action had been determined against him. *Held*, that he had waived his right to object.—*Moore v. Gamgee*, 38 W.R. 669.
- (vi.) **Q. B. D.—Jurisdiction—Amount—“Admitted Set-off”—County Courts Act, 1888, s. 57.**—A county court has no jurisdiction to try an action for more than £50, but reduced by a set-off to less than £50, unless such set-off is admitted by both parties, and not by the plaintiff only.—*Hubbard v. Goodley*, L.R. 25 Q.B.D. 156; 59 L.J. Q.B. 286; 62 L.T. 736; 38 W.R. 639.

(i.) **Q. B. D.—Power to Grant New Trial—County Courts Act, 1888, s. 98.**—A judge of a county court can only grant a new trial on the grounds on which a new trial can be granted in the High Court, and he is bound by the principles laid down by the High Court as applicable to the granting of new trials.—*Murtagh v. Barry*, L.R. 24 Q.B.D. 632; 38 W.R. 526

Covenant:—

(ii.) **C. A.—Restrictive—“Trade of Retailer of Wine, &c.”**—The lessee of a theatre bought an adjoining piece of ground which was subject to a covenant, of which he had notice, that the “trade of an innkeeper, victualler, or retailer of wine, spirits or beer,” should not be carried on there. He built an entrance to his theatre on the ground, and set up there a refreshment bar, at which persons who paid for admittance to the theatre could purchase wine, spirits and beer during the performances. *Held*, that he was infringing the covenant—*Buckles v. Fredericks*, L.R. 44 Ch. D. 244.

Criminal Law:—

(iii.) **Q. B. D.—Adulteration—Summons—Validity—Time—Jervis's Act, 11 and 12 Vict., c. 42, s. 1—Sale of Food and Drugs Act Amendment Act, 1879, s. 10.**—A complaint was made before two justices against A. for selling adulterated milk, and a summons was granted, but not signed. It was signed by a justice who had not heard the complaint. A. appeared under protest and was convicted. This was more than twenty-eight days after the sale of the alleged adulterated milk. *Held*, that the summons was bad, and that even if the irregularity was waived by the appearance of A., the justices had no jurisdiction to hear the case, owing to the lapse of time.—*Dixon v. Wells*, 38 W.R. 606.

(iv.) **Q. B. D.—Assault—Dismissal of Charge—Certificate—Civil Action—24 & 25 Vict., c. 100, ss. 44, 45.**—A certificate of the dismissal by a magistrate of a charge of assault, can only be granted when there has been a hearing “upon the merits,” and both parties have attended, and there has been a proper enquiry. Therefore, when a prosecutor who had obtained a summons for assault gave notice to the person summoned that he should not attend before the magistrate, and did not attend, or give evidence, but the person charged attended, *held*, that a certificate of the dismissal of the charge obtained from the magistrate was no bar to a county court action for the same assault; and that the county court judge could enquire into the validity of the certificate, and consider whether the magistrate had jurisdiction to grant it.—*Reed v. Nutt*, L.R. 24 Q.B.D. 669; 59 L.J. Q.B. 311; 62 L.T. 635; 38 W.R. 621.

(v.) **Q. B. D.—Information—Conviction—Statement of Offence.**—A bye-law provided that smoke should not be emitted from certain tramway engines “so as to constitute any reasonable ground of complaint to the passengers or the public;” the penalty being the same whichever class of persons had ground of complaint. An information and conviction stated that the defendant permitted smoke to escape contrary to the bye-law, without stating that there was reasonable ground of complaint to the passengers or to the public or to which of them. *Held*, that the statement was insufficient, and that the conviction must be quashed.—*Cotterill v. Lempriere*, L.R. 24 Q.B.D. 634; 62 L.T. 695.

(vi.) **C. C. R.—Larceny—Trick—Prestence.**—The prisoner shewed the prosecutor a purse and three shillings. He pretended to drop the shillings into the purse, and induced the prosecutor to give him a shilling for the purse and its contents. He had really dropped three halfpennies

into the purse. *Held*, that as the prosecutor had parted with the property in his shilling in exchange for the purse and its contents, the prisoner was guilty, if at all, of obtaining money by false pretences, and could not be convicted of larceny.—*Reg. v. Solomons*, 62 L.T. 672.

(i.) **Q. B. D.**—“*Nemo bis vexari debet*.”—A. was charged with non-compliance on the 21st of August, and ten days thereafter, with an order requiring him to keep a dangerous dog under control. No evidence was given except as to the 21st of August, and the charge was dismissed on the ground that the offence had not been made out. Subsequently A. was charged and convicted of not keeping the dog under control on the 21st of August simply. *Held*, that the conviction was bad, as A. was put in peril and might have been convicted on the first hearing, and the matter was *res judicata* on the second hearing.—*Ryley v. Brown*, 62 L.T. 458.

(ii.) **Q. B. D.**—*Practice—Appeal—Recognisance—Estreat of—Summary Jurisdiction Act, 1879, s. 31, sub-s. (3)*.—Where a person convicted by a Court of summary jurisdiction appeals to Quarter Sessions, and enters into the recognisance required by statute after the prescribed time, such recognisance is not void, and though the Court of Quarter Sessions cannot hear the appeal on account of the recognisance being out of time, it has jurisdiction to estreat the recognisance for non-payment of such costs as may have been awarded upon the dismissal of the appeal.—*Reg. v. Glamorganshire Justices*, L.R. 24 Q.B.D. 675; 62 L.T. 730; 38 W.R. 640.

Damages:—

(iii.) **C. A.**—*Detention of Goods—Measure of Damages*.—Decision of Ch. D. (see Vol. 15, p. 7, ii.) affirmed.—*Dreyfus v. Peruvian Guano Co.*, 62 L.T. 518.

(iv.) **P. D.**—*Divorce—Co-respondent*.—Damages in a divorce suit are not to be awarded as a punishment to the co-respondent, and his means ought not to be considered. They are solely to compensate the husband for the loss he has suffered. Where the wife has led a loose life before marriage, his loss is not so great as if she had been a virtuous woman.—*Darbshire v. Darbshire*, 62 L.T. 664.

(v.) **Q. B. D.**—*Measure of—Apprenticeship—Wrongful Dismissal*.—By deed of apprenticeship, the plaintiff bound himself to the defendant for a term, with a provision that the defendant might cancel the deed at a week's notice, if the plaintiff shewed want of interest in his work. The defendant dismissed the plaintiff without notice on charges of misconduct. In an action for wrongful dismissal it was proved that the charges were unfounded, but that the defendant might properly have cancelled the deed at a week's notice. The judge directed the jury that in assessing the damages they were not bound to limit them to the value of the week's notice lost by the plaintiff, though they might take into consideration the fact that the defendant would have been entitled to dismiss him with a week's notice. *Held*, that there was no misdirection.—*Maw v. Jones*, L.R. 25 Q.B.D. 107.

See Patent, p. 126, v.

Deed:—

(vi.) **C. A.**—*Construction—“Exclusive Use of Gateway”*.—Decision of Ch. D. (see Vol. 15, p. 99, iv.) affirmed.—*Reilly v. Booth*, L.R. 44 Ch. D. 12; 62 L.T. 378; 38 W.R. 484.

Dentist:—

(i.) **C. A.—Registration—Erasing Name from Register—Liability—Discretion Exercised without Malice.**—The plaintiff's name was placed on the dentists' register in respect of a diploma from the Irish College of Surgeons. The diploma was withdrawn on the ground that the plaintiff had advertised in breach of an undertaking not to do so, and thereupon the defendants, without calling on the plaintiff for an explanation, directed his name to be erased from the register. It was held, in an action for a mandamus, that the defendants had acted erroneously, and that the name must be restored. Held, in an action for damages for wrongful removal, that the functions exercised by the defendants were discretionary and not ministerial, and that they were not liable to an action for the erroneous exercise of their discretion in the absence of malice.—*Partridge v. General Council of Medical Education and Registration*, L.R. 25 Q.B.D. 90.

Easement:—

(ii.) **Ch. D.—Mandatory Injunction.**—A mandatory injunction may be granted for the removal of a building which obstructs ancient lights, although it was completed before the issue of the writ.—*Lawrence v. Horton*, 59 L.J. Ch. 440; 62 L.T. 749; 38 W.R. 555.

Ecclesiastical Commissioners:—

(iii.) **Ch. D.—Site of Parsonage—Power to Sell—Church Building Acts**, 58 Geo. III., c. 45, s. 51; 1 & 2 Vict., c. 107, s. 9.—The Ecclesiastical Commissioners have power under the Church Building Acts to sell land which has been purchased by them for the site of a parsonage house, and has become unsuitable for that purpose.—*Ecclesiastical Commissioners to King*, 62 L.T. 535; 38 W.R. 473.

Ecclesiastical Law:—

(iv.) **Court of Arches.—Misconduct of Clerk—Conviction—Suspension.**—The Court has jurisdiction to suspend a clerk *ab officio* on account of the scandal caused by his conviction by justices of having been drunk and riotous in a public place, without considering whether the offence charged had been actually committed.—*Borough v. Collins*, L.R. 15 P.D. 81.

Evidence:—

(v.) **P. D.—Divorce—Adultery.**—A husband, petitioning for divorce, proved that he had with a policeman traced the respondent and co-respondent to a house, that in the presence of the said persons and of the landlady questions were put to the respondent, and admissions made by her, that incriminating statements were made against her and the co-respondent by the landlady, and that the co-respondent made no reply. Held, that there was not evidence that adultery had been committed at that house, and that the evidence of the landlady must be obtained.—*White v. White*, 62 L.T. 663.

Executor.—See Practice, p. 129, i.

Fishery:—

(vi.) **H. L.—Salmon—Royal Grants—Competing Title.**—The appellant owned a salmon fishery on the Ness. His title was founded on a Crown Charter, dated 1591, purporting to grant all "the waters of the Ness, with all the salmon fishings thereof from the stone 'C.' to the sea." Admittedly the grant did not include two fishings within those limits

which had existed from an early date under other grants. The respondent owned the land of "H.", which abutted on the river, being situate nearly equally above and below the stone "C." His title to one half of H. was under a Crown Charter, dated 1561, and granting "Half the lands of 'H.' with the salmon fishings pertaining to the same." His title to the other half of H. was under a charter which did not mention fishings. There was no exact description of the two halves of "H." Held, that the appellant was entitled to the exclusive right to the fishing below "C" as against the respondent, there being no contradiction between the titles, as the possession by the respondent of the fishing above "C" fully satisfied his title.—*Warrant v. Mackintosh*, L.R. 15 App. Cas. 52.

Foreign Judgment:—

(i.) **C. A.**—*Action to Enforce—Alleged Fraud—Re-trial of Merits.*—In an action to enforce a foreign judgment it is competent for the defendant to allege that the foreign judgment was obtained by fraud, even though the fraud alleged is such as necessitates the re-trial of the merits adjudicated on by the foreign Court.—*Vadala v. Lawes*, 62 L.T. 701; 38 W.R. 594.

Gaming:—

(ii.) **Q. B. D.**—*Betting—Room kept for Betting—Betting Houses Act, 1853, ss. 1, 3.*—A person on three successive days went to the bar-room of a public-house for the purpose of betting, and there made bets on horse races, but had no interest in the keeping, management, or tenancy of the room, or of any part of the public-house. Held, that he had not committed the offence of opening, keeping, or using a room for the purpose of betting.—*Whitehurst v. Fincher*, 62 L.T. 433.

Goodwill:—

(iii.) **Ch. D.**—*Sale of Business—Use of Vendor's Name.*—T. sold a business, goodwill, and stock-in-trade to S., including business cards bearing T.'s name. S. issued further cards bearing T.'s name. The assignment contained no express authority to use T.'s name. Held, that S. must be restrained from using T.'s name so as to hold him out as a person with whom contracts are made which would impose liability on him.—*Thynne v. Shore*, 38 W.R. 667.

Highway:—

(iv.) **Q. B. D.**—*Repair—Indictment—Ratione Tenurae—Owner—Alteration—Turnpike Act.*—An indictment for non-repair of a highway lies only against the occupier, and not against the owner, of lands the tenure of which carries with it the burden of repairing the highway. Where a highway becomes repairable by trustees under a Turnpike Act, the common liability to repair it (whether such liability is on the parish or on an individual *ratione tenurae*) continues, in the absence of any enactment to the contrary, so long as the highway remains similar in character to what it was at the time of the passing of the Act. But if the highway is so altered by the trustees as to destroy what was the old highway, the common law liability is put an end to by operation of law.—*Reg. v. Barker*, 62 L.T. 578.

Gift:—

(v.) **C. A.**—*Chattels—Delivery.*—A verbal gift of chattels capable of delivery, although assented to by the donee, if unaccompanied by delivery of possession, passes no property in the chattels to the donee.—*Cochrane v. Moore*, L.R. 25 Q.B.D. 57; 38 W.R. 588.

Husband and Wife :-

(i.) **P. D.—Divorce—Desertion.**—A husband, having been absent from his wife for nearly two years under circumstances which amounted to desertion, a few days before the end of that time invited her to come to the house where he was living. They did not however actually live together before the period of two years had elapsed. The question was left to the jury whether the husband had honestly intended to resume co-habitation or not, and the jury finding that his intention was only to escape the consequences of the two years' absence, the issue of desertion was decided against him.—*French-Brewster v. French-Brewster*, 62 L.T. 609.

(ii.) **P. D.—Divorce—Adultery of Wife—Former Judicial Separation—Cruelty—Discretionary Bar.**—A wife obtained a judicial separation on the ground of the husband's cruelty, and was given the custody of the child of the marriage. The husband was ordered to pay alimony, but failed to do so. The wife by deed relinquished the custody of the child, and her right to alimony for a small consideration. She afterwards committed adultery. Held, that the husband ought not to be refused a decree *nisi*.—*Badham v. Badham*, 62 L.T. 663.

(iii.) **P. D.—Divorce—Discretionary Bar—Desertion.**—A young officer was induced to marry a woman by false statements made by her that she had been entrapped into a marriage with a man who had a wife living. After discovering that her story was false and that she had been incontinent he left her, and did not see her for seven years. He contributed nothing to her support, believing that she had some private means, and having himself nothing but his pay. She committed adultery during that time. Held, that the husband was not disentitled to a divorce.—*Kennedy v. Kennedy*, 62 L.T. 705.

(iv.) **P. D.—Divorce—Marriage before Decree Absolute—Adultery—Right to Relief.**—The petitioner obtained a decree *nisi* against his first wife, and married the present respondent before it was made absolute. The Queen's Proctor did not intervene, and the decree was made absolute, after which the petitioner and respondent went through a second ceremony of marriage. Held, that the petitioner was entitled to have the second marriage dissolved by reason of the respondent's adultery, and that his right was not barred by reason of his adultery committed prior to the final dissolution of the first marriage.—*Styles v. Styles*, 62 L.T. 618.

(v.) **P. D.—Divorce—Variation of Settlement.**—Petition by the husband for variation of settlements, on a divorce for his wife's adultery. The settlement gave the wife a first life interest in the fund brought in by herself, and gave her contingent benefits, the principal one being an increase of income on the death of her mother. Held, that the respondent's interest in the fund brought into settlement by the petitioner should be extinguished, that the respondent should pay him a yearly sum towards the maintenance of the child of the marriage, which sum was to be increased on the death of the respondent's mother, that the respondent should be excluded from the power of appointment among the issue, but should still have power to appoint or join in appointing new trustees, and that the registrar in reporting as to the variation, was right in refusing to consider the probability of an increase in the petitioner's income consequent on promotion.—*Tupper v. Tupper*, 62 L.T. 665.

(vi.) **C. A.—Divorce—Variation of Settlements—Refusal to Make Further Variation.**—Decision of P. D. (see Vol. 15, p. 81, vi.), affirmed.—*Benyon v. Benyon*, L.R. 15 P.D. 54; 62 L.T. 381.

(i.) **H. L.**—*Divorce—Wife's Costs.*—The rule as to the payment of a wife's costs of a divorce suit by her husband is that she is only entitled to have them so paid on the theory that she is still his wife. In a case where the wife had been adjudged by the Court of first instance and the Court of Appeal to have been guilty of adultery, held, that she must bear her own costs of an appeal to the House of Lords.—*Begg v. Begg*, L.R. 15 App. Cas. 170.

(ii.) **P. D.**—*Marriage—Validity—Japanese Marriage.*—A British subject with an Irish domicil of origin, temporarily resident in Japan, married a Japanese woman in Japan, according to the forms required by law in that country. Evidence having been given that the marriage was valid according to the law of Japan, and that the husband was precluded from marrying any other woman during the subsistence of the marriage; held, that the marriage was valid in this country.—*Brinkley v. Attorney-General*, L.R. 15 P.D. 76; 59 L.P. P. 57.

(iii.) **P. D.**—*Restitution of Conjugal Rights—Disobedience of Wife—Order for Settlement on Husband.*—A decree for the restitution of conjugal rights was disobeyed by the wife. She was possessed of a separate income, a part of which was payable under her marriage settlement. Ordered that she should make an annual payment thereout to her husband.—*Swift v. Swift*, L.R. 15 P.D. 118; 59 L.J. P. 61; 62 L.T. 609.

Justices :—

(iv.) **Q. B. D.**—*Adjournment of Summons—Ground for—Discretion.*—A magistrate cannot judicially consider, as ground for adjourning the hearing of a summons for libel, the fact that civil proceedings are pending between different parties for a different libel, though arising out of the same matter.—*Iley v. Evans*, 62 L.T. 570.

See Criminal Law, p. 115, iii..

Lands Clauses Act:—

(v.) **C. A.**—*Purchase-Money in Court—Redemption of Consols—Reinvestment—Costs—Lands Clauses Act, 1845, ss. 69, 80—Lord St. Leonards' Act, s. 10—R.S.C., 1888, O. xxii., r. 17.*—The purchase-money of land belonging to a lunatic was paid into Court, and invested in three per cent. consols. The committee did not assent to the conversion, and the consols were redeemed, and the redemption-money paid into Court. Held, that the redemption-money was "cash under the control of the Court," and might be invested accordingly; and, also, that the company which took the land must bear the costs, as the re-investment was rendered reasonably necessary by the Act of the Legislature.—*In re Brown*, 38 W.R. 529.

Land Registry :—

(vi.) **P. D.**—*Sequestration—Writ of Vacating—Jurisdiction—Land Charges Act, 1888.*—Writs of sequestration were issued to enforce payment of alimony and costs, and were duly registered. Before the lands were sold the claims were satisfied. Held, that the writs and the sequestrators could be discharged, but that there was no power to vacate the registration.—*Cook v. Cook*, L.R. 15 P.D. 118; 62 L.T. 667; 38 W.R. 656.

Landlord and Tenant:—

(vii.) **C. A.**—*Covenant—“Good Tenable Repair.”*—Under a covenant to keep a house in "good tenable repair," and so leave the same at the expiration of the lease, the tenant is bound to put and keep the house

in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it (see Vol. 15, p. 83, i.)—*Proudfoot v. Hart*, L.R. 25 Q.B.D. 42.

(i.) **Ch. D.—Underlessees—Payment of Rent by One—Contribution.**—Where A. held part of the land comprised in a lease by an assignment from the original lessee at an apportioned rent, and B. held another part as under lessee at a rent which he had subsequently bought up, and A. was compelled by threats of distress to pay the whole rent due under the original lease, held, that as there was no one entitled to sue B. for his share of such rent, A. and B. were not liable to a common demand, and A. had accordingly no right to contribution from B.—*Johnson v. Wild*, L.R. 44 Ch. D. 146; 59 L.J. Ch. 322; 62 L.T. 537; 38 W.R. 500.

Libel:—

(ii.) **C. A.—Second Action for same Libel—Frivolous and Vexatious.**—The defendants had published the judgment delivered in an action brought against them by the plaintiff. The plaintiff sued them for libel in respect thereof, specifying certain passages as defamatory. The publication was held to be privileged. The plaintiff brought a second action in respect of the same publication, specifying certain other passages as defamatory, and raising as a point of law a question suggested as a doubt in the House of Lords, on the argument of the former action. Held, that the action must be dismissed as being frivolous and vexatious.—*Macdougall v. Knight*, L.R. 25 Q.B.D. 1; 38 W.R. 553.

Licensing:—

(iii.) **Q. B. D.—Gaming—Betting—Betting Act, 1853, ss. 1, 3—Licensing Act, 1872, s. 17.**—A. was the keeper of a licensed tavern, close to which was some waste land and a public path. On the day of a race meeting a betting man was for some hours on the waste land and path making bets, and receiving packets containing money from backers of horses, which packets were at intervals brought into the house by A.'s daughter, and with his connivance. Held, that he could not be convicted of suffering his house to be used for the purposes of betting.—*Davis v. Stephenson*, L.R. 24 Q.B.D. 529; 59 L.J. M.C. 73; 62 L.T. 436; 38 W.R. 492.

Life Assurance:—

(iv.) **C. A.—Premiums—Payment by Stranger—Lien.**—Decision of Ch. D. (see Vol. 15, p. 45, ii.) affirmed.—*Strutt v. Tippett*, 62 L.T. 475.

Limitations:—

(v.) **Ch. D.—Acknowledgment—Payment by Principal Debtor—Surety.**—Where sureties gave a promissory note to secure an advance to a principal debtor, who did not join in the note, held, that payment by the principal debtor did not operate as an acknowledgment to prevent the statute running in favour of a surety. Held, also, that an affidavit as to creditors, made by an executor in an administration action, is not an acknowledgment to prevent the statute running in favour of the testator's estate.—*Wolmerhausen v. Wolmerhausen*, 62 L.T. 541; 38 W.R. 537.

(i.) **C. A.**—*Cause of Action—Money Deposited—Conditions as to Repayment—Death of Lender.*—A. deposited money with the defendants on loan, repayable on notice, with certain conditions as to the production of a pass book before repayment. A. gave notice of withdrawal. On the day of repayment A. died intestate, without having applied for or received the money. A.'s administrator sued for the money more than six years after the date named for repayment, but less than six years after the grant of letters of administration. *Held*, that the conditions as to production of the pass-book were conditions precedent to any liability in the defendants to repay the money, and that, as these conditions had not been fulfilled by A., no cause of action arose in his lifetime, and that the Statute of Limitations did not begin to run till the grant of letters of administration.—*Atkinson v. Bradford Third Equitable Benefit Building Society*, 38 W.R. 630.

(ii.) **H. L.**—*Concealed Fraud—Frivolous and Oppressive Action.*—To establish a case of concealed fraud within the Statute of Limitations, it is not enough to prove a concealed fraud; the plaintiff must shew that he or his predecessor has been by such fraud deprived of the land sought to be recovered, and that the fraud could not by reasonable diligence have been known or discovered more than the statutory period before action brought. It is not enough to allege fraud generally. The statement of claim must contain precise and full statements of facts leading to the reasonable inference that fraud was the cause of the deprivation, and excluding other possible causes. In default of such allegations the Court may dismiss the action as frivolous and vexatious.—*Lawrance v. Norreys*, L.R. 15 App. Cas. 210; 62 L.T. 706.

Local Government:—

(iii.) **C. A.**—*Buildings—Power to Demolish—Public Health Act, 1875, s. 158.*—A local board cannot pull down buildings erected without its approval until it has given the building owner notice of its intention to do so.—*Hopkins v. Smethwick Local Board*, L.R. 24 Q.B.D. 712; 59 L.J. Q.B. 254; 38 W.R. 499.

(iv.) **Q. B. D.**—*County Council—Executive Committee—Delegation of Powers—Contagious Diseases (Animals) Act, 1878—Local Government Act, 1888, s. 28.*—A county council, as the local authority for carrying out the provisions of the Contagious Diseases (Animals) Act, 1878, had delegated its powers to a sub-committee. Subsequently an Order in Council was issued calling on the local authorities to take steps against rabies, and the executive committee issued regulations against rabies, for breach of which the appellant was fined. *Held*, that the executive committee had not parted with their original powers by the delegation, and that the issue of the regulations was within their powers.—*Huth v. Clarke*, 38 W.R. 655.

(v.) **C. A.**—*County Council—Contagious Diseases (Animals) Act, 1869, ss. 90, 97—Contagious Diseases (Animals) Act, 1878, ss. 4, 87—Local Government Act, 1888, ss. 64, 79.*—The remedy of the local authority of a borough against the County Council for the amount of expenses incurred by the borough under the Contagious Diseases (Animals) Act, 1869, is by mandamus, and not by action.—*Mayor, &c., of Salford v. County Council of Lancashire*, 38 W.R. 661.

(vi.) **Q. B. D.**—*Main Roads—Footways—Repairs—Liability—Highways and Locomotives (Amendment) Act, 1878, ss. 18, 15—Local Government Act, 1888, s. 11, sub-ss. 1, 2.*—A county council is liable to the local board of an urban sanitary district for the costs of the maintenance and

repair, and reasonable improvement connected with the maintenance and repair, of footways by the sides of "main roads" within the district, and of paved or pitched crossings over such roads, and for the costs of alterations in the flagging or pavements of such footways, if the alteration is a reasonable improvement, any dispute as to whether such alteration is a reasonable improvement being settled by the arbitration of the Local Government Board.—*In re Warminster Local Board and Wiltshire County Council*, 38 W.R. 670.

(i.) **Q. B. D.—New Building—Addition.**—By an Improvement Act it was provided that "the making of any addition to an existing building by raising any part thereof," should be deemed to be the erection of a new building. A house had a conservatory on the first floor, which was subsequently removed and a room built instead thereof, part of one of the main walls of the house being raised. The room occupied no greater height and space than the conservatory had occupied. *Held*, that it was not on that account prevented from being "an addition to an existing building."—*Meadows v. Taylor*, L.R. 24 Q.B.D. 717; 62 L.T. 658.

(ii.) **Ch. D.—Street Improvement—Charge on Premises—Sale to Satisfy Charge—Free from Covenants—Public Health Act, 1875, ss. 4, 150, 257, 276.**—The charge on premises for the expenses of street improvements, is a charge on the whole proprietorship of the premises, and not merely on the estate in fee simple. Premises subject to covenants restrictive of building, which become liable to such a charge, may, for the purpose of satisfying the charge, be sold free from the covenants.—*Guardians of Tendring Union v. Downton*, 38 W.R. 653.

Lottery :—

(iii.) **Ch. D.—Foreign Lottery—Concession—Advertising—Company Prospectus—Lotteries Acts, 9 Geo. I., c. 19, s. 4; 6 & 7 Will. IV., c. 66.**—A company, incorporated in England for the purpose of carrying on financial and other operations in Persia, stated in its prospectus that it was intended to acquire a concession from the Shah, which granted the exclusive right of holding lotteries in Persia. It stated that "five issues have to be made annually in Persia, with minimum drawings of £10,000." A shareholder moved to restrain the company from obtaining the concession, or advertising the lotteries. *Held*, that the purchase of the concession was legal, and that the statement in the prospectus was not in contravention of the Lotteries Acts as a notice of a foreign lottery.—*Macnee v. Persian Investment Corporation*, L.R. 44 Ch. D. 306; 38 W.R. 596.

Lunatic :—

(iv.) **Q. B. D.—Dangerous Person—Removal to Workhouse—Guardians—Expenses of—Necessaries.**—X., who was suffering from *delirium tremens*, became violent and dangerous in his own house. The relieving officer had him removed to the workhouse. He was brought before the magistrates as a lunatic, but was discharged, being held not to be a lunatic. Certain expenses were incurred by the guardians. *Held*, that apart from the Lunacy Acts, there was a common law liability on X. to repay such expenses, and that the guardians could recover the same as money expended for necessities.—*West Ham Guardians v. Pearson*, 62 L.T. 698.

See *Lands Clauses Act*, p. 120, v.

Marine Insurance:—

(i.) **C. A.**—*Lloyd's "Running Down" Clause—Further Insurance—Collision—Both Vessels to Blame—Indemnity.*—Judgment of Q. B. D. (see Vol. 15, p. 47, vii.) affirmed.—*London Steamship Owner's Insurance Co. v. Grampian Steamship Co.*, L.R. 24.Q.B.D. 663; 38 W.R. 651.

Married Woman:—

(ii.) **C. A.**—*Ante-nuptial Debts—Contracted During Former Marriage—Married Women's Property Act, 1882, ss. 13, 19.*—The liability of a married woman to the extent of her separate estate in respect of ante-nuptial debts, and the invalidity as regards such debts of a restraint on anticipation imposed by her in a settlement of her own property, refer to debts contracted by her during a previous coverture, as well as to debts contracted by her while a *feme sole*.—*Jay v. Robinson*, 38 W.R. 550.

(iii.) **Q. B. D.**—*Evidence of Separate Property—Married Women's Property Act, 1882, s. 1, sub-s. 3.*—No evidence as to the intention, or absence of intention, of a married woman to contract with respect of her separate property can be admitted, but only evidence as to the existence of separate property in respect of which she might reasonably be deemed to have contracted. Where a jeweller sued a married woman for jewellery supplied, and she was not proved to possess any separate property except jewellery, dresses, and furs; held, that such property was property with respect of which she might reasonably be deemed to have contracted.—*Bonner v. Lyon*, 38 W.R. 541.

(iv.) **Ch. D.**—*Separate Estate—Partnership—Contract to Indemnify.*—A married woman being a member of a firm has sufficient separate estate to justify her in maintaining an action as a member of the firm. The defendants contracted with a firm to indemnify them against a claim by X., the defendants being at liberty to use the name of the firm in deferring any action by X. An action had at the time of the contract been commenced by X., which was defended by the defendants in the name of the firm. The defendants stated in their pleadings that E., who was a married woman, had become the surviving partner in the firm. Judgment was given in favour of X., who threatened execution. Held, that E., being estopped from denying her liability as a member of the firm, was liable under the judgment, and was accordingly entitled to the benefit of the indemnity.—*Eddowes v. Argentine Loan and Mercantile Agency Co.*, 62 L.T. 602.

Master and Servant:—

(v.) **Q. B. D.**—“*Act or Omission*” of Servant—“*Rule or Bye-law*”—“*Instructions*”—*Employers' Liability Act, 1880, s. 1, sub-s. 4; s. 2, sub-s. 2.*—The plaintiff was engaged by the defendant to cut wood with a circular steam saw. X. was also engaged to help in the saw mill and to look after the engine. The plaintiff and X. together held the wood which was being cut. X. hearing the engine blowing off, left the wood without notice to the plaintiff, and the plaintiff was, in consequence, injured. Held, that the defendant was not liable, as the “act or omission” of X. which caused the injury was not done “in obedience to any rule or bye-law of the employer, or to instructions by any delegate of his.”—*Whatley v. Holloway*, 62 L.T. 639.

(vi.) **C. A. & Q. B. D.**—*Negligence—Employers' Liability Act, 1880, s. 1, sub-s. 3.*—The plaintiff was employed by the defendant to work at a certain machine. He was bound to comply with the orders of X., who

was also in the defendant's employment, as to what work he was to do, but was not otherwise under the control of X. While doing the work he had been ordered by X. to do he was injured owing to the negligence of X. Held, that the defendant was not liable.—*Snowden v. Baynes*, L.R. 24 Q.B.D. 568; 59 L.J. Q.B. 325; 38 W.R. 558.

Metropolis Management:—

(i.) **Q. B. D.**—*Power of Vestry—Order to Furnish Water-Closet with Door—Summons—Jurisdiction*—18 & 19 Vict., c. 120, s. 81—25 & 26 Vict., c. 102, s. 64.—A vestry gave notice to X., requiring him to furnish proper doors to a water-closet. X. did not comply with the notice, or appeal to the County Council, and was summoned by the vestry. Held, that his proper remedy was to appeal to the County Council if he objected to the order of the vestry; and, that as he had not done so, the magistrate was bound to convict, on being satisfied that the order had been made, and not complied with.—*Vestry of St. James and St. John, Clerkenwell, v. Feary*, L.R. 24 Q.B.D. 703; 59 L.J. M.C. 82; 62 L.T. 697.

(ii.) **Q. B. D.**—*Metropolitan Building Act—Thickness of Party-wall—“Topmost Storey.”*—In order to constitute a “topmost storey” within the meaning of the rules of the Metropolitan Building Act, 1855, which prescribe the thickness of party-walls, rooms need not have four vertical walls, but are within the rules if they are bounded on one side by a sloping roof.—*Foot v. Hodgson*, L.R. 25 Q.B.D. 160; 59 L.J. Q.B. 343.

Mortgage:—

(iii.) **Ch. D.**—*Action to Ascertain Charge—Costs—Priority—Harbour Commissioners—Commissioners Clauses Act, 1847, s. 60.*—The plaintiffs had recovered judgment against the defendants, the commissioners, and in this action, brought to enforce the judgment, had obtained an order for a receiver and for inquiries as to the commissioners' property and debts and the priorities of incumbrances. There were funds brought into Court, derived from rates and tolls, which formed part of the property mortgaged to various incumbrancers. Held, that the plaintiffs were entitled, in priority to the other parties other than the commissioners, to their costs of the action so far as they had been incurred for the benefit of such other parties; but that the commissioners were, under the Commissioners Clauses Act, 1847, s. 60, entitled to their costs as between solicitor and client out of the fund in Court in priority to all other parties.—*Batten, Proffitt, & Scott v. Dartmouth Harbour Commissioners*, 38 W.R. 603.

(iv.) **Ch. D.**—*Equitable Mortgagors—Postponement of First—Negligence—Title Deeds—Legal Estate.*—A., having to the knowledge of the plaintiff's solicitor, shewn a good title to Blackacre, produced to the plaintiff's solicitor a forged deed, purporting to be a conveyance to him of Whiteacre, a property near to Blackacre, by the person who had conveyed Blackacre. The plaintiff, by his solicitor's advice, advanced money on the security of Whiteacre, no requisition as to the identity of the property having been made. A. subsequently mortgaged the same property to the defendant. A. had obtained the equitable estate prior to both mortgages. The defendant, who had possession of the title deeds, obtained a conveyance of the legal estate, all parties then having notice of the plaintiff's mortgage. Held, (1) that the plaintiff had not been guilty of such negligence as to be postponed; (2) that the possession of the title deeds conferred no advantage on the defendant; and (3) that the getting in of the legal estate was no protection to him.—*Taylor v. Russell*, 38 W.R. 663.

(i.) **Ch. D.**—*Foreclosure — Successive Incumbrances — Jointress — Conveyancing Act, 1881, s. 15—Conveyancing Act, 1882, s. 12.*—The plaintiffs in a foreclosure action were first mortgagees; the second incumbrancer was a jointress; the plaintiffs were the third incumbrancers; there were several subsequent incumbrancers. *Ordered*, that the jointress should have six months to redeem; in case she redeemed, the plaintiffs as third mortgagees, to have three months to redeem subject to the jointure, and a period of three months to the subsequent incumbrancers; but if she did not redeem a period of three months to such incumbrancers. Liberty to persons redeeming to apply in respect of conveyance to trustees for them.—*Smithett v. Hesketh*, L.R. 44 Ch. D. 161.

(ii.) **Ch. D.**—*Sale under Power—Reservation of Minerals—Petition—Service on Mortgagor—25 & 26 Vict., c. 108.*—Where a mortgagee applies for liberty to sell, with a reservation of the mines and minerals under the land sold, the mortgagor must be a petitioner or must be served with the petition.—*In re Hirst's Mortgage Trust*, 38 W.R. 685.

See *Solicitor*, p. 140, v. *Vendor and Purchaser*, p. 142, ii.

Nuisance :—

(iii.) **Q. B. D.**—*Thistles—Neglect to Cut.*—An occupier of land is under no obligation to cut down his thistles periodically; and if owing to his neglect to do so, their seeds are blown on to adjoining land, and do damage, he is not liable.—*Giles v. Walker*, L.R. 24 Q.B.D. 656.

Patent :—

(iv.) **Ch. D.**—*Action to Restrain Threats—“Due Diligence”—Discontinuance — Patents, &c., Act, 1883, s. 32.*—An action to restrain infringement may be “prosecuted with due diligence,” so as to protect the plaintiff therein against an action to restrain threats, although the plaintiff discovers before trial that he has no cause of action, and discontinues the action. *Seemle*, the defendant in a threats action will not be wanting in “due diligence” if he waits a reasonable time for the delivery of the statement of claim, to see if he can raise the question of infringement by counter claim. Threats action by A. against B. on 22nd September, 1888. Infringement action by B. against A. on 6th December, 1888. Statements of claim and defence in the threats action delivered on 8th February, 1889, and 9th March, 1889, respectively. Statement of claim in infringement action delivered on 13th May, 1889, the time having been extended by consent. On 6th November, 1889, B. discovered, from the report of an expert, made under an inspection order in the threats action, that there was no infringement, and at once discontinued his action, and paid A.’s costs of it. On trial of the threats action, held, that B. had commenced and prosecuted his action with “due diligence,” and that A. had no cause of action.—*Colley v. Hart*, L.R. 44 Ch. D. 179; 59 L.J. Ch. 308; 62 L.T. 424; 38 W.R. 501.

(v.) **C. A.**—*Infringement—Damages—Reduction in Price by Competition.*—Decision of Ch. D. (see Vol. 15, p. 87, i.) reversed.—*American Braided Wire Co. v. Thomson*, L.R. 44 Ch. D. 274; 59 L.J. Ch. 429; 62 L.T. 616.

(vi.) **C. A.**—*Mortgage—Suit by Mortgagor—Mortgagee not Joined—Patents, &c. Act, 1883, ss. 23, 46, 55, 57—R.S.C., 1883, O. xvi, r. 11.*—The mortgagor of a patent is entitled to sue for infringement without joining the mortgagee as a co-plaintiff. The mortgagee may be added as a co-defendant at any time, either on his own application, or on an application by the defendant, if it appears to be necessary for the purposes of justice. The practice of the comptroller to enter the mortgagee as mortgagee only, and not as assignee, is correct. Decision

of Ch. D. (see Vol. 15, p. 87, iii.) reversed.—*Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flour Co.*, 38 W.R. 625.

Poor Law:—

- (i.) **Q. B. D.**—*Retrospective Poor Rate—Validity*—22 & 23 Vict., c 49, s. 6.—A contribution order made by guardians in respect of expenses for the relief of the poor in 1889 included arrears due from a parish in 1886. The arrears had not been inserted in any estimates or orders between 1886 and 1889. *Held*, that the order was good.—*Guardians of Caistor v. Overseers of North Kelsey*, 62 L.T. 731.
- (ii.) **C. A.**—*Settlement—Illegitimate Child—Place of Birth—Mother Living—Onus of Proof*—4 & 5 Wm. IV., c. 76, s. 71.—Decision of Q.B.D. (see Vol. 15, p. 88, i.) affirmed.—*Headington Guardians v. Ipswich Guardians*, L.R. 25 Q.B.D. 143; 59 L.J. M.C. 92; 38 W.R. 586.
- (iii.) **C. A.**—*Settlement—Pauper Aged Sixteen—Residence with Father—Divided Parishes Act, 1876, s. 35; Removal Act, 11 & 12 Vict., c. 111.*—Decision of Q. B. D. (see Vol. 15, p. 52, vi.) affirmed.—*Mitford Guardians v. Wayland Guardians*, L.R. 25 Q.B.D. 164; 59 L.J. M.C. 86; 38 W.R. 632.
- (iv.) **Q. B. D.**—*Settlement—Divided Parishes Act, 1876, s. 35—Illegitimate Child Under Sixteen.*—An illegitimate, like a legitimate, child cannot acquire a settlement for itself, while under the age of sixteen, but must follow the settlement of its mother.—*Manchester Overseers v. Ormskirk Guardians*, L.R. 24 Q.B.D. 678; 62 L.T. 661.

Power:—

- (v.) **Ch. D.**—*Fraud on—Appointment of Residue.*—A testator, having a power to appoint a fund among his children, appointed a sum, part thereof, to his daughter, J., but directed that it should be settled on her and her issue. He appointed the residue of the fund to his son, R., and in case he had exceeded his power in directing the settlement of the sum appointed to J., and such settlement should be objected to or should not be confirmed by J., or her husband, or others having the right or power to object thereto, he appointed the same sum to R., expressing his assurance that R. would voluntarily settle the same according to his wishes. After the testator's death R. executed a declaration of trust of the sum in question according to the testator's wishes. There was no evidence of any bargain between the testator and R. *Held* (1) that the appointment to J. was invalid; (2) that the sum in question did not pass to R. under the "residue"; (3) that the appointment to R. was not a fraud on the power, as he was under no obligation to settle it.—*Crawshay v. Crawshay*, L.R. 43 Ch. D. 615; 59 L.J. Ch. 395; 62 L.T. 489; 38 W.R. 600.

See Will, p. 145, iii.

Practice:—

- (vi.) **Ch. D.**—*Admission—Judgment on—Motion—Summons—Costs.*—In an action for an injunction to restrain interference with lights and for damages, the defendant paid money into Court, and offered in his defence to consent to an order embodying an undertaking as to building, and to pay the costs. The plaintiff accepted the order, prepared minutes, and gave notice of motion for judgment. The defendant's solicitor wrote that he wished for a summons in chambers as the cheaper course. The plaintiff proceeded with his motion. *Held*, that he was only entitled to the costs of a summons in chambers, and to the costs of preparing the minutes. The judge intimated that he would have allowed counsel in chambers.—*Allen v. Oakey*, 62 L.T. 724.

(i.) **C. H.**—*Affidavit—Defect in Jurat*—R.S.C., 1883, O. xxxviii, rr. 6, 14.—The jurat of an affidavit stated that it was "Sworn at R. in the British Vice-Consulate." It was signed by A., as vice-consul, and the seal of the vice-consul was appended. Some alterations in the affidavit were initialled, and some blanks filled up in the same handwriting as the signature. *Held*, that though the words "before me" should have been inserted, there was a reasonable probability that it was sworn before the vice-consul, and that it ought to be received.—*Eddowes v. Argentine Loan and Mercantile Agency Co.*, 59 L.J. Ch. 392; 62 L.T. 514; 38 W.R. 629.

(ii.) **P. D.**—*Admiralty—Pleadings*.—Where a case is transferred from a County Court, pleadings must be entered into as if the case had been commenced in the Admiralty Division.—*The Carisbrook*, 38 W.R. 543.

(iii.) **C. A.**—*Appeal—Probate—Contentious Business*.—The judge had refused to grant letters of administration to an intestate estate, to C., who claimed to be a creditor of the intestate. *Held*, that whether the application was contentious or not there was a right of appeal.—*In re Cloock*, L.R. 15 P.D. 132.

(iv.) **C. A.**—*Appeal—Striking Solicitor off Rolls*.—An appeal lies to the Court of Appeal from an order striking a solicitor off the rolls under section 32 of the Solicitors' Act, 1843.—*E. p. Davy; in re Eede*, 38 W.R. 683.

(v.) **P. & C.**—*Appeal—Verdict of Jury—Setting Aside*.—A verdict of a jury will not be disturbed as being against evidence or the weight of evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find.—*Phillips v. Martin*, L.R. 15 App. Cas. 193.

(vi.) **H. L.**—*Appeal—Withdrawal—Form of Order*.—The appellant's counsel, having opened the appeal, asked leave to withdraw it on certain observations being made unfavourable to the success of the appeal. The House gave no opinion on the merits, and pronounced the following order: "That the appellant having asked leave to abandon the appeal, and due consideration being had of what had been offered for the appellant; *Ordered*, that the interlocutors appealed from be affirmed, and the appeal dismissed with costs."—*Inglis v. Inglis*, L.R. 15 App. Cas. 169.

(vii.) **Q. B. D.**—*Award—Application to Set Aside—Time*—R.S.C., 1883, O. lxxiv, r. 14.—A notice of motion to set aside the award of an arbitrator is in time if given before the last day of the sittings next after such award has been made and published, although the motion cannot be heard until after the expiration of those sittings.—*In re Gallop and Central Queensland Meat Export Co.*, 38 W.R. 621.

(viii.) **Q. B. D.**—*Costs—Security*.—The Court will not, as a general rule, require security for costs of an appeal from the county court, where the judge of that court has given leave to appeal unconditionally.—*Society of Apothecaries, e. p.*, 38 W.R. 478.

(ix.) **C. A.**—*Security for Costs—Bankrupt Plaintiff—Application to make Trustee Plaintiff*.—The plaintiff sued for rent due under a lease. The defendant discovered that at the date of the lease the plaintiff was a bankrupt, his discharge having been made conditional on paying a dividend which he had not paid. The defendant applied to have the trustee in bankruptcy made plaintiff, or that security for costs might be

ordered. *Held*, that the defendant was estopped from denying the title of his lessor, and setting up that of the trustee; that the mere fact of the bankruptcy was not sufficient ground for ordering security for costs; that the plaintiff was not a mere nominal plaintiff suing on behalf of the trustee, and that he could not be required on that ground to give security for costs.—*Cook v. Whellock*, L.R. 24 Q.B.D. 658; 59 L.J. Q.B. 329; 62 L.T. 675; 38 W.R. 534.

- (i.) **Ch. D.—Death of Plaintiff—Continuing Cause of Action—3 & 4 Will. IV., c. 42, s. 2.**—The sole plaintiff, in an action for an injunction and damages for obstruction to the access of light to a freehold house, died more than six months after the issue of the writ, leaving B. her executor and the devisee of the house. *Held* that B., as executor, had a right to continue the action for damages in respect of the six months prior to the plaintiff's death, and that the right to a mandatory injunction, if established, passed to B. as devisee, and that consequently the cause of action continued, and B. was entitled to carry on the proceedings.—*Jones v. Simes*, L.R. 43 Ch. D. 607; 59 L.J. Ch. 351; 62 L.T. 447.
- (ii.) **C. A.—Discovery—Production of Documents—Person not Party—R.S.C., 1883, O. xxxvii., r. 7.**—An order cannot be made before the trial of an action for the production of documents by a person not a party to the action.—*Elder v. Carter*, 59 L.J. Q.B.D. 281; 62 L.T. 516; 38 W.R. 612.
- (iii.) **C. A.—Discovery—Documents—Agreement to Grant Lease—Specific Performance—Lessor's Title Deeds—Vendor and Purchaser Act, 1874, s. 2.**—See Vol. 15, p. 90, i. *Held*, on appeal, that an agreement for a right of way during the lease was an agreement for a lease of land within the meaning of the Vendor and Purchaser Act, 1874, and that the deeds relating to the right of way were in the same position as the other deeds. *Held*, also, that if the defendant had raised a definite objection which the Court could try, he would have had the usual right of a litigant to the production of documents, relevant to the issue, but that he acquired no such right by a mere general denial of the plaintiff's title, or a vague general allegation that the property was subject to restrictive covenants.—*Jones v. Watts*, L.R. 43 Ch. D. 574; 62 L.T. 471.
- (iv.) **Ch. D.—Discovery—Documents—State Official—Privileges—Colonial Government.**—M., the Agent-General of a Colonial Government, being party to an action, objected in his affidavit of documents to produce certain documents, on the ground that he had no property in them, that they were the property of the Colonial Government (which was not a party to the action) and had been acquired by him in his official capacity; and that he had been directed by his superiors to object to their production on the ground of the interest of the public service. *Held*, that as an official he was only entitled to take copies for his own protection, and to use them for that purpose only; that it would be a breach of duty on his part to produce documents which he knew his superiors objected to produce, and that the Court had no jurisdiction to order the production.—*Wright v. Mills*, 62 L.T. 558.
- (v.) **C. A. & Q. B. D.—Discovery—Inspection of Document—Document not Disclosed in Affidavit—R.S.C., 1883, O. xxxi., r. 18.**—*Held* by Q. B. D. that where a party making application for the inspection of a specific document makes an affidavit specifying such document, and stating that he believes that it contains entries which he would be entitled to inspect, and that it is in the possession of the other party, the Court may order inspection thereof, although the other party has made an affidavit of documents, not disclosing such document, and con-

cluding with the general averment that, save as therein disclosed, he has not in his possession or power any document whatsoever relating to the matter in question in the action. *Held*, by C. A., on affidavit being made by the latter party that no such document is in his possession or control, or in that of any other person in his behalf, that the order of Q. B. D. could not stand, no opinion being given as to the point of law. —*Wiedeman v. Walpole*, L.R. 24 Q.B.D. 537 & 626.

- (i.) **Q. B. D.** — *Discovery—Interrogatories—Objection—Striking Out*—R.S.C., 1883, O., xxxi., rr. 6, 7.—An order cannot be made striking out those parts of a set of interrogatories which the judge considers objectionable. Any objection which the interrogated party has must be taken in the affidavit in answer.—*Sammons v. Bailey*, L.R. 24 Q.B.D. 727; 59 L.J. Q.B. 342; 38 W.R. 605.
- (ii.) **Q. B. D.** — *Discovery—Interrogatories—Privilege*.—Interrogatories were administered to the town clerk of a corporation, under an order for the examination of A. “the town clerk to the above-named plaintiffs.” A. objected to answer on the ground that the whole of the information which he or the plaintiffs possessed had been obtained by him as solicitor for the plaintiffs in the action, and was therefore privileged. *Held*, that the information was privileged, and the answer sufficient.—*Mayor, &c., of Salford v. Lever*, L.R. 24 Q.B.D. 695; 59 L.J. Q.B. 248; 62 L.T. 434.
- (iii.) **Q. B. D.** — *Evidence—Examination of Witnesses Abroad—Commission—Letters of Request*—R.S.C., 1883, O. xxxvii., rr. 5, 6a.—Where an examination of witnesses abroad by a special examiner is ordered, letters of request may also be issued, the examination not being an ordinary commission.—*Mason and Barry v. Comptoir D'Escompte*, 38 W.R. 685.
- (iv.) **C. A.** — *Injunction—Undertaking as to Damages*.—An undertaking as to damages is not to be confined to damages sustained by the party against whom an injunction is granted. Action against M., L. and a company, to restrain the company from confirming certain agreements made with M. and L. An interim injunction was granted. M. asked for the usual undertaking as to damages, which the plaintiff's counsel assented to. The order as drawn up was confined to damages sustained by the company. *Held*, that it ought to be extended to damages sustained by M., but not to those sustained by L., who had not asked for an undertaking. A judge can correct an order which does not express what he intended, though it has been passed and entered.—*Tucker v. New Brunswick Co.*, L.R. 44 Ch. D. 249.
- (v.) **C. A. & Q. B. D.** — *Interrogatories—Penal Action—Fraudulent Removal of Goods by Tenant*—11 Geo. II., c. 19, s. 8.—An action by a landlord to recover double value against a tenant for fraudulently removing goods to avoid a distress, and against others for wilfully aiding in the removal, is a penal action, and the plaintiff cannot interrogate the defendants.—*Hobbs v. Hudson*, 62 L.T. 764; 38 W.R. 639 & 682.
- (vi.) **P. D.** — *Interrogatories*.—In an action arising out of a collision in which the plaintiff's vessel was lost, with all of the crew who could give evidence as to the collision, the plaintiff was allowed to interrogate the defendants as to the circumstances of the collision.—*The Isle of Cyprus*, L.R. P.D. 184.
- (vii.) **P. D.** — *Divorce—Citation of Co-respondent Dispensed with*.—A wife, the respondent to a divorce petition, had in her diary mentioned X. as having committed adultery with her, and had registered a child born while she was living apart from her husband, as the child of X. X. was

believed to be in America. *Held*, that the citation of X. might be dispensed with.—*Bagot v. Bagot*, 62 L.T. 612.

- (i.) **P. D.—Divorce—Motion to Dispense with Citation of Co-respondent.**—A husband who charged his wife with committing adultery with N., moved for leave to proceed without citing N., or that he might be cited by registered letter. There was no legal evidence against N., the only evidence as to adultery being the wife's confessions. *Held*, that N. must be cited, and served personally.—*Cornish v. Cornish*, L.R. 15 P.D. 131; 62 L.T. 667.
- (ii.) **P. D.—Divorce—Dismissal for Want of Prosecution.**—The pendency of proceedings for permanent maintenance held to be a valid excuse for the wife's delay in obtaining a decree absolute, and a motion for dismissal for want of prosecution refused with costs.—*Southern v. Southern*, 62 L.T. 668.
- (iii.) **Ch. D.—Evidence—Action against a Bank—Statements by Manager.**—Evidence given by the manager of a bank, in an action against the bank, with respect to the practice of the bank in making loans to customers, may be read in another action against the bank so far as relevant to the matters in question.—*Simmonds v. London Joint Stock Bank; Little v. Same*, 62 L.T. 427.
- (iv.) **C. A.—Evidence—Inquiries in Chambers—Closing—Cross-Examination—Discretion—R.S.C., 1883, O., xxxviii., r. 18.**—The rule that, in proceedings in chambers after judgment, liberty to cross-examine is, in the absence of special circumstances, only given on the footing that all the evidence will be completed before cross-examination, and that no fresh evidence is allowed to be given afterwards, is a good and convenient rule. The matter is however in the discretion of the judge, who may depart from the rule if he thinks fit.—*Issard v. Lambert*, L.R. 44 Ch. D. 253; 62 L.T. 715; 38 W.R. 584.
- (v.) **Ch. D.—Evidence—Examiner—Cross-Examination—Order of—R.S.C., 1883, O., xxxvii., rr. 21, 22.**—A shareholder applying for the rectification of the register of a company, obtained an order that the witnesses on both sides should be cross-examined before an examiner. *Held*, that the shareholder's witnesses ought to be cross-examined first if the company desires to cross-examine them.—*In re Doré Gallery*, 62 L.T. 758; 38 W.R. 491.
- (vi.) **C. A.—Garnishee Order—Equitable Right—Priority.**—A. assigned to B. the amount of a verdict recovered by him in an action, and covenanted for further assurance of the amount of the verdict or other sum or sums of money which might become payable in the action to A. A new trial was obtained, and resulted in a verdict for A. of the same amount as before. X., a judgment creditor of A., obtained a garnishee's order attaching the amount recovered in the action. *Held*, that whether the assignment included the amount of the second verdict or not, B. acquired, by the assignment and the covenant for further assurance, an equitable right, which prevented A. from dealing with the amount recovered, and that the assignment accordingly took priority over the garnishee order.—*Davis v. Freethy*, L.R. 24 Q.B.D. 519.
- (vii.) **C. A.—Interpleader—Costs—Charges of Wharfinger—R.S.C., 1883, O. lvii., rr. 2, 15.**—An order may be made by the Court or a judge for payment of the charges of a wharfinger who has interpleaded.—*De Rothschild v. Morrison*, L.R. 24 Q.B.D. 750; 38 W.R. 635.
- (viii.) **C. A.—Nullity—Alleged Insanity—Guardian ad Litem—Decision of P. D. (see Vol. 15, p. 91, iii.) affirmed.—*Fry v. Fry*, L.R. 15 P.D. 50; 62 L.T. 501; *Routh v. Fry*, 59 L.J. P. 48; 38 W.R. 615.**

(i.) **Q. B. D.—Official Referee—Appeal from—R.S.C., 1883, O. xxxvi., r. 50.**—An appeal from an order of the official referee, refusing to postpone the hearing ought to be made to the judge in-chambers.—*Richard v. Talbot*, 88 W.R. 478.

(ii.) **Ch. D.—Official Referee—Judgment Entered—Motion to Set Aside—Jurisdiction.**—Where an award has been made by an official referee, and judgment has been actually entered up, the Court cannot alter the findings of fact, the only remedy of the party desiring to question the award being to go to the Court of Appeal on the whole case.—*Scire v. Fardell*, L.R. 44 Ch. D. 299; 62 L.T. 359.

(iii.) **Ch. D.—Order Dismissing Action—Default by Plaintiff—Not Drawn up or Served—R.S.C., 1883, O. xxvii. r. 1; O. lxiv., r. 7.**—When an order has been made in chambers dismissing an action unless the next step is taken by the plaintiff within a specified time, and the plaintiff does not take that step within the specified time or appeal against the order, the order takes effect, and the action becomes dead, and the time for taking the step cannot be enlarged, although the order was not drawn up or served on the plaintiff till it became operative.—*Script Phonography Co. v. Gregg*, 59 L.J. Ch. 406.

(iv.) **C. A.—Palatine Action—Transfer to High Court.**—Action in the Palatine Court against several persons impeaching a sale of property. The property was within the jurisdiction, and all the parties resided within the jurisdiction, at the time of the sale. X., one of the defendants, whose conduct was especially impeached, had left the jurisdiction at the time of action brought, and was served out of the jurisdiction by leave of the Court of Appeal. He moved to transfer the action to the High Court, the other defendants, except one whose interest was the same as the plaintiffs, concurring. Held, that there was no sufficient reason shewn for obliging X. to defend in the Palatine Court, and that the action ought to be transferred.—*Cooke v. Smith*, L.R. 44 Ch. D. 72; 62 L.T. 712.

(v.) **C. A.—Payment into Court—Lien—R.S.C., O. 1, r. 8.**—Where an action is brought to recover specific property, which the defendant, not disputing the plaintiff's title, claims to retain by virtue of a lien, the Court may order the property to be given up to the plaintiff, on payment into Court by him of the amount in respect of which the lien is claimed. The whole of such amount must be paid in, although it may exceed the value of the property.—*Gebruder Naf v. Ploton*, L.R. 25 Q.B.D. 13; 38 W.R. 566.

(vi.) **Q. B. D.—Pleading—Matter in Aggravation of Damages.**—A paragraph in a statement of claim for a libel published in a newspaper stated that the defendant knew that the words published would be, and that the same in fact were, repeated and published in other editions of the same paper. Held, that evidence of the facts stated in the paragraph might be given at the trial, and that the paragraph was therefore rightly pleaded.—*Whitney v. Moignard*, L.R. 24 Q.B.D. 630; 59 L.J. Q.B. 324.

(vii.) **Ch. D.—Pleading—Patent—Common Knowledge—Infringement—Costs of Issues.**—Where the defendant to an action for infringement relies on common knowledge as distinguished from anticipation, this defence should be distinctly pleaded. The defendant in an action for infringement denied the infringement. This issue was decided against him, but judgment was given in his favour on the ground of want of novelty in the alleged invention. Held, that the defendant was not entitled to the costs of the issue of the infringement.—*Phillips v. Ivel Cycle Co.*, 62 L.T. 392.

- (i.) **Ch. D.—Representative Defendant—Submission to Judgment**—*R. S. C.*, 1883, *O. xvi.*, *r. 9*.—A person authorised by the Court to defend an action on behalf of others having the same interest, cannot consent to judgment against them. If there is no defence he may submit on their behalf to judgment.—*Rees v. Richmond*, 62 L.T. 427.
- (ii.) **C. A.—Security for Costs—Appeal**.—A married woman, who has no separate property which she is not restrained from anticipating, and who appeals without a next friend, must give security for the costs of the appeal.—*Whittaker v. Kershaw*, L.R. 44 Ch. D. 296; 38 W.R. 497.
- (iii.) **Q. B. D.—Security for Costs—Company in Liquidation—Companies Act, 1862, s. 69**.—The fact of a plaintiff company being in liquidation is a reason for believing, in the absence of evidence to the contrary, that it will be unable to pay the costs if the action is unsuccessful, and the defendant is accordingly entitled to security for costs.—*Pure Spirit Co. v. Fowler*, 38 W.R. 686.
- (iv.) **Ch. D.—Service out of Jurisdiction—Trade-Mark**.—In an action to restrain the infringement of the plaintiff's trade-mark, the defendants being a company having their principal place of business in Belfast, and supplying customers, but having no agents in England, an *ex parte* order for service of the writ out of the jurisdiction was discharged. The fact that a motion by the plaintiff to strike the defendants' trade-mark off the register is pending is not material in considering the balance of convenience.—*Kinahan & Sons v. Kinahan, Lyle & Kinahan*, 62 L.T. 718; 38 W.R. 655.
- (v.) **Ch. D.—Service—No Appearance—Notice of Motion for Attachment**—*R.S.C.*, 1883, *O. xliv.*, *r. 2*; *O. xlvi.*, *r. 4*.—The defendant had not appeared, and the writ and statement had been filed. An order that he should pay money into Court was made and served on him personally, and was not obeyed. Notice of motion for leave to issue a writ of attachment had been filed. Held, that such filing was sufficient service.—*Morris v. Fowler*, L.R. 44 Ch. D. 151; 59 L.J. Ch. 407; 62 L.T. 758; 38 W.R. 522.
- (vi.) **P. D.—Special Jury—Certificate—Omission to ask for—Special Jury Act, 6 Geo. IV, c. 50, s. 34**.—At the trial of a probate action in January, the plaintiff obtained a verdict on every issue. The judge had left the building when the verdict was given, and next morning, on the application of counsel gave judgment in accordance with the verdict. The counsel omitted to ask for the special jury certificate. On application for the certificate in April, held, that it could not be given.—*Webster v. Appleton*, 62 L.T. 704.
- (vii.) **C. A.—Writ—Indorsement—Address of Plaintiff**—*R.S.C.*, 1883, *O. iv.*, *r. 1*; *Appendix A, Part 1, Form 1*.—The address of the plaintiff's residence, and not only of his place of business, must be indorsed on a writ of summons.—*Stoy v. Rees*, L.R. 24 Q.B.D. 748; 59 L.J. Q.B. 310; 38 W.R. 683.
- (viii.) **Ch. D.—Writ—Misdescription of Defendant—Conditional Appearance**—*R.S.C.*, 1883, *O. xii.*, *r. 30*.—The writ described the defendant as "J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate Hill." The defendant, who was not in fact carrying on the business, entered an appearance as "J. L. Young, sued as J. L. Young, carrying on business as the Edison Mineograph Co., at No. 60, Ludgate Hill, but who denies that he is carrying on business as the Edison Mineograph Co., at No. 60, Ludgate Hill, aforesaid, or elsewhere." Held, on motion by the defendant to set aside the writ and subsequent proceedings for irregularity, that there was no irregularity in the writ,

'that the mistake had been set right by the form of the defendant's appearance, and that the motion must be refused.—*Zuccato v. Young*, 88 W.R. 474.

(i.) **Ch. D.—Winding-up—Supervision Order—Amendment—Re-Advertisement.**—Where, after a winding-up petition has been presented, but before the hearing, a company passes resolutions for voluntary winding-up, and a supervision order is made on the petition, the Court has jurisdiction to dispense with the amendment of the petition by stating the resolutions, and also with re-advertisements; and will exercise the jurisdiction where the resolutions are mentioned in the affidavits filed in support of the petition.—*In re Marine & General Land Building and Investment Co.*, 62 L.T. 723.

See Company, p. 112, iv. *Libel*, p. 121, ii. *Limitations*, p. 122, ii. *Railway*, p. 135, iv.

Principal and Agent:—

(ii.) **C. A.—Commission Received by Agent—Right of Principal to Follow.**—Where an agent for purchase corruptly receives commission moneys without the knowledge of his principal, the relation between him and his principal in respect thereof is that of debtor and creditor, not that of trustee and cestui-que-trust; and consequently when the principal has brought an action to recover such moneys, he is not entitled either to an injunction to restrain the agent from dealing with any investments which may represent the same, or to an order for payment thereof into Court pending the trial.—*Lister v. Stubbs*, 62 L.T. 654; 88 W.R. 458.

Principal and Surety:

(iii.) **Ch. D.—Co-Sureties—Counter-Security Given by Principal Debtor to One Co-Surety—Right of Co-Sureties to Participate.**—A co-surety who has received from the principal debtor a counter-security against the liability he has incurred, is bound to bring the same into hotch-pot for the benefit of his co-sureties; consequently, when by means of the counter-security he has been repaid what he has paid in respect of the principal debt, and has shared the amount so received with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over to the co-sureties, whereupon their right to participate will again arise; whereby, in effect, the whole of the counter-security is applicable for the benefit of all the co-sureties equally, to refund the whole of the payments made by them on account of the principal debt.—*Berridge v. Berridge*, L.R. 44 Ch. D. 168; 88 W.R. 599.

(iv.) **Ch. D.—Discharge—Bankruptcy.**—One of five co-sureties became bankrupt, and the creditors proved for the balance due to them, but afterwards withdrew their proof, and gave a general receipt to the trustee in bankruptcy, in pursuance of certain arrangements which they had made with respect to the debt. Held, that the withdrawal of the proof was *pro tanto* a discharge of the co-sureties; but that the receipt given to the trustee was no discharge, as the debt became several on the bankruptcy, and the receipt was not intended to be a discharge.—*Wolmerhausen v. Wolmerhausen*, 88 W.R. 537.

See Limitations, p. 121, v.

Promissory Note:—

(v.) **Ch. D.—Renunciation—Note Payable on Demand—Maturity—Bills of Exchange Act, 1882, ss. 62, 89.**—A promissory note payable on demand is at maturity as soon as made. A testator had lent a niece £2,000 on a promissory note, payable on demand. He bequeathed her a legacy of

£6,000, and directed that if the sum of £2,000 was due and owing at his death it should be deducted from the legacy. On his death-bed he expressed a desire to destroy the note and forgive the debt. The note could not be found, and a memorandum of his wishes was made in writing which was not signed by him. *Held*, that there was no absolute and unconditional renunciation in writing.—*Francis v. Bruce*, 88 W.R. 617.

Public Prosecutor:—

(i.) **Q. B. D.**—*Indictment—Acquittal of Accused—Costs—Various Indictments Act, 22 & 23 Vict., c. 17—80 & 81 Vict., c. 33, s. 2—Prosecution of Offences Acts, 1879, s. 7, & 1884.*—A prosecutor entered into recognisances to carry on a prosecution for alleged conspiracy but gave no security for costs. A true bill having been found, the Director of Public Prosecutions took up the case, and the accused persons were acquitted. *Held*, that the Director was not liable to pay their costs, as the original prosecutor had given no security for costs.—*Stubbs v. Director of Public Prosecutions*, L.R. 24 Q.B.D. 577; 59 L.J. Q.B. 201; 62 L.T. 399; 88 W.R. 607.

Railway:—

(ii.) **C. A.**—*Deposit—Abandonment—Winding-up—Notice to Treat.*—The Act which incorporated a railway company provided that, in case the railway should not be opened, the deposit should be applied in compensating, amongst others, landowners who have “suffered injury or loss in consequence of the compulsory powers” conferred on the company, and subject thereto should, if the company had been ordered to be wound-up, be applied as part of the assets for the benefit of creditors, in the discretion of the Chancery Division. An Abandonment Act was afterwards passed which directed that the company should wind up its affairs. *Held*, that, as the company could not be wound-up by petition, the last Act must be construed as an order to wind-up the company, which would enable the Court to apply the deposit for the benefit of creditors. *Held*, also, that notice to treat was not by itself an exercise of the company’s compulsory powers, so as to give landowners who had received such notices a prior claim against the deposit for “injury or loss in consequence of the compulsory powers,” but that such landowners might claim with other creditors if they could show injury or damage suffered in consequence of the non-completion of the contract.—*In re Uxbridge and Rickmansworth Railway Acts*, L.R. 43 Ch. D. 586; 59 L.J. Ch. 409; 62 L.T. 347; 88 W.R. 644.

(iii.) **P. C.**—*Compensation—Minerals—Workable at a Profit—New South Wales Law.*—Where land is taken compulsorily, the fact that there is a conflict of evidence as to whether there are minerals under it which are workable at a profit, does not impose on the owner the burden of proving by experiment the nature of the subjacent minerals as a condition precedent to obtaining compensation. Where a particular seam cannot be worked at a profit at the time the land is taken, compensation may be given for it, if it is likely to prove profitable in the future.—*Brown v. Commissioner for Railways*, L.R. 15 App. Cas. 240; 62 L.T. 469.

(iv.) **C. A.**—*Land Taken or Injuriously Affected—Compensation—Title—Jurisdiction—Mode of Trial.*—The question as to compensation in respect of land taken or injuriously affected, which, under section 41 of the Regulation of Railways Act, 1868, may be tried by a judge of a Superior Court with a jury, is the same as that previously tried by the sheriff with a jury, and consequently the judge and jury cannot under

that section determine the title to compensation, but only the amount. *Sembles*, that a trial under that section cannot be held by a judge without a jury.—*In re East London Railway*, *Oliver's Claim*, L.R. 24 Q.B.D. 507.

(i.) **C. A.**—*Widening—New Line—Deviation—Railways Clauses Act, 1845, s. 15.*—Decision of Ch. D. (see Vol. 14, p. 89, iii.) affirmed.—*Finck v. L. & S.W.R.*, 59 L.J. Ch. 458; 38 W.R. 513.

(ii.) **C. A.**—*Undue Preference—Set-Off—Railway and Canal Traffic Act, 1854, ss. 2, 3, 6—Interest—Demand—8 & 4 Wm. IV., c. 52, s. 28.*—The Railway Commission decided that the plaintiffs had given an undue preference to another company over the defendants, by charging such other company lower rates than those charged to the defendants. The defendants attempted, in an action by the plaintiffs, to set-off or counter-claim as overcharges the amounts by which charges paid by them to the plaintiffs, previously to such decision, exceeded the charges paid by the other company. *Held*, that the set-off or counter-claim failed. *Held*, also, that a claim in the writ for interest from the date of the writ till payment or judgment was not a good demand, so as to entitle the plaintiffs to judgment for such interest.—*Rhymney Railway Co. v. Rhymney Iron Co.*, L.R. 25 Q.B.D. 146.

Resulting Trust:—

(iii.) **C. A. & Ch. D.**—*Assignment in Trust for Creditors—Surplus.*—A trading firm, by a deed which recited the inability of the firm to pay its debts in full, assigned the business and effects of the firm to trustees for the benefit of the scheduled creditors, who released the assignor from all debts and claims. The trustees were empowered to carry on the business or to sell the same at their own discretion. There was a declaration of trust as to any surplus which might remain after payment of the creditors in full. *Held*, that there was a resulting trust of such surplus in favour of the assignors.—*Cooke v Smith*, 62 L.T. 456; 38 W.R. 641.

Revenue:—

(iv.) **Q. B. D.**—*Income Tax—Annuity—Sinking Fund.*—A railway company received an annuity from a foreign government, terminable after twenty years, part of which the company was bound to apply to a sinking fund for the redemption of its debenture debt. *Held*, that income tax was payable on the whole annuity, no deduction in respect of the part applied to the sinking fund being claimable.—*H. H. The Nisam's State Railway Co. v. Wyatt*, L.R. 24 Q.B.D. 548; 62 L.T. 765.

(v.) **C. A.**—*Income Tax—Exemption—Premium on Life Insurance—Foreign Company.*—Decision of Q. B. D. (see Vol. 15, p. 94, vii.) affirmed.—*Colquhoun v. Heddon*, L.R. 25 Q.B.D. 129; 38 W.R. 545.

(vi.) **Q. B. D.**—*Inhabited House Duty—Exemption—“Hospital or Charity School”*—48 Geo. III., c. 55, Sched. B., Case iv.—14 & 15 Vict., c. 36, s. 2.—A school which was originally exempt from inhabited house duty, as a “hospital or charity school,” was altered in character, and became a general public school, at which large fees were paid for most of the scholars, the charitable foundation providing scholarships for some of them. No part of the buildings was set apart for the holders of the scholarships. *Held*, that the school, having substantially ceased to be a charitable school, had lost its right to exemption.—*Governors of Charterhouse v. Lamarque*, L.R. 25 Q.B.D. 121.

(i.) **Q. B. D.**—*Inhabited House Duty—Exemption—Customs and Inland Revenue Act, 1878, s. 18, sub-s. 2.*—A house was used by the London Library as a library and reading rooms for the use of members, who paid subscriptions, but derived no pecuniary profit therefrom. No person dwelt on the premises except an attendant, who had apartments in addition to his wages. *Held*, that the house was not exempt from inhabited house duty.—*The London Library v. Carter*, 62 L.T. 466; 38 W.R. 478.

(ii.) **Q. B. D.**—*Stamp Duty—Voluntary Settlement—Declaratory Act—Retrospective—Customs and Inland Revenue Act, 1881, s. 28—Customs and Inland Revenue Act, 1889, s. 11.*—The directions contained in the Act of 1889, with reference to the construction of the Act of 1881 must be followed, even in a case where the property sought to be taxed passed to the beneficiaries, and the proceedings to recover the duty were taken before the second Act came into operation.—*Attorney-General v. Theobald*, L.R. 24 Q.B.D. 557; 62 L.T. 768; 38 W.R. 527.

Sale of Goods:—

(iii.) **Q. B. D.**—*Implied Warranty—Knowledge of Seller.*—An implied warranty that goods sold are fit for a particular purpose, only arises when the purpose for which the goods are purchased is known to the seller; and there is no implied warranty that the article sold is fit for every ordinary purpose for which an article of the description is used, unless it is shewn that some particular use of it is so usual as to affect the seller with knowledge that it is required for that use.—*Jones v. Padgett & Co.*, L.R. 24 Q.B.D. 650; 59 L.J. Q.B. 261.

Sale of Shares:—

(iv.) **Q. B. D.**—*Certification of Transfer—Voucher of Title—Ultra Vires—Representation as to Credit and Ability—Signature—Lord Tenterden's Act, s. 6.*—L. sold to the plaintiff, through a broker, shares in the defendant company. The broker took the transfer, before execution by the plaintiff or payment of the price, to the defendant's office for "certification," and a note "certificate lodged," signed on behalf of the secretary was placed on it. The price was then paid to L., but the defendants, finding that L. had no title to the shares, refused to recognise the plaintiff's title. The plaintiff sued to recover the price, and the Judge found as a fact that the "certification" was a representation by the defendants that a genuine certificate, covering the shares purported to be transferred, had been lodged with them, and that L. had a good title to the shares, and that the representation was made with the intent that a purchaser should act upon it. *Held*, that the action could not be maintained (1) because the "certification" was *ultra vires*; and (2) because it was a representation as to the credit and ability of L. within the meaning of Lord Tenterden's Act, and was not binding on the defendants, not being under their seal.—*Bishop v. Balkis Consolidated Co.*, L.R. 25 Q.B.D. 77.

Scotch Law:—

(v.) **H. L.**—*Agreement to Refer—Arbiter not Named.*—By Scotch law an agreement to refer future disputes, if and when they shall arise, to a person not named, and designated only by his filling a particular office or position, is not binding.—*Tancred & Co. v. Steel Company of Scotland*, L.R. 15 App. Cas. 125; 62 L.T. 739,

(vi.) **H. L.**—*Husband and Wife—Post-Nuptial Contract—Conveyance or Testamentary Deed.*—A husband and wife, by post-nuptial contract, recited that their ante-nuptial contract had become unsuitable. The

husband secured to the wife an annuity if she should survive him, which she accepted in full of all legal claims. And she granted to him all her estate, movable and heritable, and nominated him "sole executor and universal legator." The husband predeceased the wife, bequeathing all his property to trustees. Part of the wife's estate consisted of a share of the residue of an estate which had been given to her in life-rent, exclusive of her husband, with a general power of appointment over the *corpus*. Held, that the post-nuptial contract was not a testamentary deed, but a deed of mutual credit, and that the right which each party obtained was a right of credit which vested at once, and, therefore, that the share of residue passed by the husband's will to his trustees.—*M'Onie v. Whyte*, L.R. 15 App. Cas. 156.

(i.) **H. L.**—*Sale of Entailed Estate*—“*Ratification*”—*Specific Performance*—*Scotch Entailed Estates Acts*, 11 & 12 Vict., c. 36, s. 4; 16 & 17 Vict., c. 94, s. 5; 38 & 39 Vict., c. 61, ss. 5, 6; 45 & 46 Vict., c. 53, s. 18.—A., the heir in possession of an entailed estate, offered to sell the estate to X. by a letter, which contained the words, “the sale is made subject to the ratification of the Court.” The offer was accepted. A. petitioned for an order for the sale of the estate under the last-mentioned Act, whereupon the next heir of entail objected to the sale by private contract, and demanded a sale by auction. Held, that the procedure adopted by A. was not such as was contemplated by the contract, and that he was bound to take the requisite steps under the earlier Acts for disposing of the estate without the consent of the other heirs of entail. Held, also, that a decree for specific performance was proper.—*Stewart v. Kennedy*, L.R. 15 App. Cas. 75.

Settled Land :—

(ii.) **Ch. D.**—*Chattels Settled to go with Mansion—Sale of House—Sale and Removal of Chattels*—*Settled Land Act*, 1882, s. 37.—Chattels were given by will on trust to be held and enjoyed with the P. house. Some of the settled personalty was invested in the purchase of a house more suitable for the family mansion than the P. house. Leave was given to sell the P. house, and such of the settled chattels as were not suitable for removal to the new house, and to remove to that house such of them as were suitable for removal.—*Browne v. Collins*, 62 L.T. 566.

Ship :—

(iii.) **Q. B. D.**—*Action in Rem for Wages—Mate—County Court*.—The mate of a vessel who has finished his articles and been paid off, but remains on board as chief officer, to superintend the discharge of cargo, and look after the vessel in port, is entitled to proceed *in rem* against the vessel for his remuneration in the County Court.—*Reg. v. City of London Judge*, 88 W.R. 638.

(iv.) **P. D.**—*Collision—Breach of Regulations—Mersey Rules*.—In considering whether a breach of regulations could have contributed to a collision the whole of the evidence must be considered, even when there is a conflict; and the onus of shewing that the breach could not have contributed to the collision is on those who committed the breach. By the Mersey Rules a vessel at anchor is bound to carry two lights, the after-light being at double the height of the forward light. The E., at anchor, carried two lights at about the same height. The H., which ran into her, saw only the after-light. Held, that the H. was to blame for a bad look-out, and the E. for a breach of the regulations, it not being shewn that the breach could not have contributed to the collision.—*The Hermod*, 62 L.T. 670.

(i.) **P. D.—Collision—Height of Light—Humber Rules.**—By the Humber Rules certain vessels at anchor are required to exhibit an after riding light “double the height of the bow-light.” *Held*, that this means at least double the height of the bow-light, but not exactly double that height, so that a vessel exhibiting an after-light at a height five feet more than double the height of the bow-light had not infringed the rule.—*The Magneta*, L.R. 15 P.D. 101; 59 L.J. P. 55.

(ii.) **H. L.—Collision.**—Decision of C. A. (see Vol. 14, p. 127, ii.), reversed on the facts, on the ground that on the evidence as it stood at the trial there was no sufficient proof that the master of the *Tasmania* was guilty of negligence, the decision of the Court of Appeal being based on a point which was not suggested at the trial.—*The Tasmania*, L.R. 15 App. Cas. 223.

(iii.) **P. D.—Demurrage—Charter-Party.**—A ship was chartered to proceed to O., and deliver her cargo of coal, at any safe wharf, craft, &c., as ordered by the receiver, the time for unloading to commence when the ship was ready, and notice had been given in writing. On arrival at O. notice was given to the consignee of her readiness to discharge. The consignee ordered her alongside the wharf, and informed the master that he would have to wait his turn. There was then, as the consignee knew, no unoccupied berth alongside the wharf, and there was no other place at O. for the discharge of coal, and no lighters available. The ship did not get alongside for four days. *Held*, that the lay days began to run when notice was given of the ship’s readiness to discharge, the consignee having ordered her to the wharf instead of providing lighters.—*The Carisbrook*, L.R. 15 P.D. 98; 59 L.J. P. 37; 38 W.R. 543.

(iv.) **C. A.—Mortgage—Arrest—Indemnity from Co-owner—Dock Dues.**—Decision of P. D. (see Vol. 15, p. 90, vii.), affirmed. *Held*, also, that the co-owners were liable to pay their proportion of certain dock dues paid by the mortgagees, in default of payment whereof the ship was liable to seizure.—*The Orchis*, 59 L.J. P. 81; 62 L.T. 407; 38 W.R. 472.

(v.) **P. D.—Salvage—Passengers—Cattle-Keepers.**—A ship had on board a cargo of cattle in charge of men, paid by the owners of the cattle, but nominally on the ship’s books. She rendered salvage services, whereby the voyage was extended in duration, but the cattle-keepers did not assist in the services. *Held*, that they were not entitled to share in the salvage.—*The Coriolanus*, L.R. 15 P.D. 103; 59 L.J. P. 59.

Solicitor :—

(vi.) **Q. B. D.—Costs—Charging Order—“Property Recovered or Preserved”—Money Paid into Court—Solicitors Act, 1860, s. 28.**—The plaintiff’s solicitor obtained an order that the defendant should pay money into Court, as a condition of leave to defend. The plaintiff subsequently compromised the action, without his solicitor’s knowledge, and discharged him. The defendant applied for payment out of the money paid in, and produced the plaintiff’s consent; but the master refused the order, being of opinion that the compromise was collusive. *Held*, on application by the plaintiff’s solicitor, that the money in Court was “property preserved” in the action, and that the solicitor was entitled to a charging order.—*Moxon v. Sheppard*, L.R. 24 Q.B.D. 627; 59 L.J. Q.B. 286; 62 L.T. 726.

(vii.) **Ch. D.—Costs—Taxation—Attempted Sale of Real Estate.**—The costs of an attempted ineffectual sale of real estate, when there is no probability of the sale being effected for some years, should be taxed under Rule 2 (c) of the General Order under the Solicitors’ Remuneration Act, 1881.—*In re Smith, Pinsent & Co.*, L.R. 44 Ch. D. 303; 38 W.R. 685.

- (i.) **H. L.**—*Costs—Taxation—Part of Bill—Agency Charges—Solicitors Act, 1843, s. 87.*—The Court has power, by virtue of its inherent jurisdiction, though not by statute, to direct taxation of part only of a solicitor's bill of costs. Taxation of part of an agency bill may be directed on terms of payment into Court of the whole amount claimed by the agents.—*Storer v. Johnson*, L.R. 15 App. Cas. 208; 62 L.T. 710.
- (ii.) **Ch. D.**—*Costs—Taxation after Payment—Special Circumstances—Delivery of Bill—Solicitors Act, 1843, s. 37.*—Solicitors to trustees delivered, to their clients bills of costs for work done for them, as trustees, which were paid without taxation, the solicitors not having informed their clients that if administration proceedings were subsequently taken, and the bills reduced in the proceedings, the trustees would have to pay the amount of such reduction out of their own pockets. The bills were honest and not excessive. Held, that the fact of such information not having been given was not a special circumstance justifying taxation after payment. The solicitors delivered to the manager of an asylum, which was carried on as part of the trust estate, bills of costs for work done for the asylum. It was not proved that the manager was authorized to receive bills for the trustees. Held, that there was no delivery to the trustees.—*In re Layton, Steel & Co.*, 38 W.R. 652.
- (iii.) **C. A.**—*Costs—Mortgage—Agreement—Client—Taxation—Solicitors' Remuneration Act, 1881, ss. 1 (3), 2, 8.*—S. instructed P., a solicitor, by letter to obtain for him a loan on certain security, and S. thereby undertook to pay P.'s costs which he agreed should be £20, exclusive of money out of pocket, incurred and to be incurred in and about doing what was necessary, in P.'s opinion, for carrying out the instructions. P. acted for both mortgagor and mortgagee, and retained £20 as the costs of both parties. S. applied for delivery of a bill for taxation. Held, that S. was constituted P.'s client, although the agreed remuneration included the mortgagee's costs, and that the latter constituted an agreement, and that in the absence of any evidence impeaching the agreement as unfair or unreasonable, it ought not to be referred to the taxing master.—*In re Palmer*, 38 W.R. 678.
- (iv.) **Ch. D.**—*Scale Costs—Lease—Premium and Rent.*—Where a lease is granted in consideration partly of a premium and partly of a rent, the solicitor is entitled to receive remuneration on a scale calculated both upon the premium and the rent.—*In re Robson*, 38 W.R. 556.
- (v.) **C. A.**—*Mortgage—Profit Costs.*—A solicitor who is a mortgagee and acts in person as a solicitor in realising his security cannot recover profit costs from the mortgagor, but only costs out of pocket.—*Lickorish, e. p.; in re Wallis*, L.R. 25 Q.B.D. 176; 62 L.T. 674; 38 W.R. 482.
- (vi.) **C. A.**—*Purchase of Subject-Matter of Suit.*—The rule that a solicitor conducting an action cannot purchase the subject-matter of a suit does not apply to a case where the purchase was effected previously to the purchaser's employment as solicitor!—*Davis v. Freethy*, L.R. 24 Q.B.D. 519; 59 L.J. Q.B. 318.
- (vii.) **C. A. & Q. B. D.**—*Striking Off Roll—Right to Apply—Evidence—Solicitors Act, 1888, s. 13.*—An application to strike a solicitor off the rolls may be made by a person who has not employed him in a professional capacity. On the hearing of the application answers given by the solicitor in the course of his public examination in bankruptcy may be used in evidence against him.—*E. p. Incorporated Law Society*, 62 L.T. 567; 38 W.R. 507 & 538; *In re Sankey*, 59 L.J. Q.B. 238; *In re A. Solicitor*, L.R. 25 Q.B.D. 17.

Trade Name.—See Company, p. 111, ii.

Trustee :—

(i.) **Ch. D.—Power Coupled with Trust—Discretion of Trustees—Interference of Court.**—Where there is a power coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees, acting *bond fide*, as to the particular time or manner of their exercise of it.—*Barningham v. Burrage*, 62 L.T. 752.

(ii.) **Ch. D.—Investment—Mortgage—Report of Surveyor—Trustee Act, 1888, ss. 4, 5—Trust Legacy—Appropriation.**—When a trust legacy has been appropriated it is a breach of trust to vary the investment thereof without reasonable cause; and the trustee is liable to indemnify the legatees, when the legacy falls into possession, against any loss resulting from an improper change of investment. A surveyor's report does not protect a trustee who is lending trust money on mortgage, unless it is made on his own instructions and directed to the particular loan. A trustee lending trust money on a mortgage, which at the time is not a proper investment in all respects except value, is liable for the whole loss, and not only for the excess of the sum lent over that which ought to have been lent.—*Walker v. Walker*, 59 L.J. Ch. 386; 62 L.T. 449.

(iii.) **Ch. D.—Maintenance—Discretion of Trustee—Assignment by Beneficiary—Payment by Trustee after Notice.**—A testator bequeathed a fund to trustees on trust during the life of X. to pay and apply the whole or any part of the income for the support, maintenance, or education or otherwise for the benefit of X., his wife or children, in such manner in all respects as the trustees should in their discretion think fit. X. assigned his interest to the plaintiff, who gave notice to the trustees. The trustees subsequently made payments to X. Held, that X. was entitled to assign his beneficial interest; that money paid to him or on his behalf was necessarily part of his beneficial interest, and was his in the irrevocable determination of the trustees immediately before the payment, at which time the trustees were affected with notice of the assignment. Held, therefore, that they were liable for all sums paid to or on behalf of X. after they had notice of the assignment.—*Henning v. Neil*, 62 L.T. 649.

Vendor and Purchaser :—

(iv.) **Ch. D.—Compensation—Misdescription—Purchaser's Knowledge—Evidence.**—Property was sold by auction, and compensation was sought in respect of a misdescription in the particulars, which stated that the same was occupied at an “annual rental,” thereby implying that the tenancy was yearly, and that the tenant paid rates and taxes, whereas in fact the tenancy was monthly, and the landlord paid rates and taxes. Held, that evidence was admissible to prove that the purchaser knew the true facts, the same having been stated in the auction-room.—*In re Edwards to Daniel Sykes & Co.*, 62 L.T. 445.

(v.) **Ch. D.—Covenant for Title—Statutory Declaration.**—In 1883 a railway company agreed to purchase land subject to certain building agreements. The agreements were to expire in case the buildings were unfinished in 1881 and 1885 respectively. The buildings were not in fact finished at those dates. The lessees afterwards established that, owing to the conduct of the owner in fee, they were equitably entitled to an extension of time for building. The company had knowledge of all the circumstances and of the lessees' claim to an extension of time. The company took possession in 1886, and were afterwards compelled by action to compensate the lessees for their interest in the land. The conveyance to the company was executed pending the lessees' action,

and was expressed to be subject to the agreements. The owner in fee and his agent made a statutory declaration that there had been no negotiation or agreement for an extension of the building agreements. Held, in the absence of fraud, that the owner was not bound, either by reason of the declaration, or of the implied covenant in the conveyance, to recoup the company the compensation they had been obliged to pay to the lessees.—*L. & N.W.R. v. Boulton*, 62 L.T. 398.

- (i.) **C. A.**—*Rescission—Defective Title—Conveyance*.—Decision of Ch. D. (see Vol. 15, p. 99, ii.) affirmed.—*In re Bryant v. Barningham's Contract*, L.R. 44 Ch. D. 218; 38 W.R. 469.
- (ii.) **Ch. D.**—*Sale by Mortgagee—Building Society—Statutory Power—Want of Notice—Conveyancing Act, 1881, ss. 19, 20—Costs of Concurring Parties*.—A building society mortgage provided that the statutory power of sale should be exercisable on default. Held, that such power, whether applicable to a building society mortgage or not, was incorporated in the mortgage. The mortgagees sold less than three months after default, and without giving the statutory notice to the mortgagor and a second mortgagee, who were, however, willing to concur. The conditions of sale provided that the assignment should be without the concurrence of any other parties than the vendors, who were mortgagees selling under a power of sale. Held, that the mortgagor and second mortgagee had waived the right to object to the want of notice, that the purchaser would get the title he had contracted for, and that the vendors must bear the costs of the concurrence of the mortgagor and second mortgagee.—*In re Thompson & Holt's Contract*, 62 L.T. 651; 38 W.R. 524.
- (iii.) **C. A.**—*Title—Sale by Trustees—Beneficiaries*.—A testator devised real estate on trust to pay the rents to his wife for life, and after her death on trust for sale, and he authorised the trustees to adjust and pay all claims made upon the estate. The estate proved insolvent and the trustees, with the consent of the widow, contracted to sell the real estate. The purchaser declined the title, and the trustees offered to obtain the consent of all the beneficiaries. Held, that the trustees had no power of sale during the life of the widow; and that the purchaser could not be compelled to accept a title other than that for which he had contracted.—*In re Head's Trustees & Macdonald*, 38 W.R. 657.

See Scotch Law, p. 138, i.

Will:—

- (iv.) **P. D.**—*Administration with Will Annexed—Specific Legatee*.—The testatrix had been for many years separated from her husband and living with A. She made a will, which named no executor, and bequeathed to A. a specific sum of money which was her whole property. A. applied for a grant of letters of administration with the will annexed. The only known relative of the testatrix had predeceased her, and it was not shewn whether her husband was living or dead. The grant was refused in the absence of evidence that search had been made for the husband or the next-of-kin.—*In the goods of Miles*, 59 L.J. P. 59; 62 L.T. 607.
- (v.) **Ch. D.**—*Construction—Forfeiture on Bankruptcy—Scotch Sequestration*.—H. was entitled under a will to the income of a legacy for his life, or until "he shall become a bankrupt . . . or shall do or suffer something whereby the same or some part thereof would, through his act or default, or by operation of law, or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons." Sequestration of the estate of H. was awarded in Scotland, on the

petition of himself and another; but at the first meeting resolutions for winding-up the estate by arrangement were passed, and no trustee was appointed. The sequestration was afterwards recalled. Between the dates of the petition and of the recall of the sequestration certain sums in respect of the income of the legacy came into the hands of the trustees. According to Scotch law H. was made a bankrupt, but the sequestered estate did not vest in any other person until the appointment of a trustee. *Held*, that though there was a bankruptcy, the right to receive the income had not vested in any other person, and therefore the clause of forfeiture did not operate.—*Clutterbuck v. James*, 62 L.T. 454.

- (i.) **Ch. D.—Construction—Limitation to Children—Omission of Words in Common Form.**—A testator bequeathed property to trustees on trust to pay the income to the widow of the testator's son for life, and after her death "in trust for all the children of my said son, who being a son or sons shall live to attain twenty-one years, or being a daughter or daughters shall marry, under that age with their mother's consent, to be divided between them share and share alike." There were powers of maintenance and advancement applicable to both sons and daughters. *Held*, that daughters who attained twenty-one were entitled to share in the fund, although they had not married under that age.—*Davies v. Hetherington*, 62 L.T. 753.
- (ii.) **Ch. D.—Construction—Tenant for Life—Power to Resort to Capital for Maintenance.**—A testator gave all his real and personal estate to his wife and H. "upon trust to allow my said wife to have the full and entire use and enjoyment thereof for her maintenance during her lifetime;" and he declared that she might "at any time during her lifetime sell, lease, mortgage, or otherwise absolutely dispose of all or any part of the said estate for her maintenance, but not by way of testamentary disposition." And he gave the residue of his estate remaining at her death to H. on certain trusts. *Held*, that the wife had a life interest in the estate, with a power to resort to the capital during her life for her maintenance, but not for any other purpose.—*Fox v. Fox*, 62 L.T. 762.
- (iii.) **Ch. D.—Construction—Time of Vesting.**—A testator directed his son to insure his life for £5,000, and to bequeath that sum to his wife if she survived him, on trust for her for life, and at her decease, or at that of the son, to be bequeathed to the testator's "daughters or their descendants in equal proportions." It having been held (see Vol. 15, p. 69, i.) that the gift was a substitutionary gift to the descendants of those of the testator's daughters who died in the lifetime of the son's wife leaving descendants, the descendants to take as joint tenants, *held* now, that descendants of a daughter of the testator, who survived that daughter, but died in the lifetime of the son's wife, having severed their joint tenancy, were entitled to participate—*Matheson v. Goodwyn*, 62 L.T. 677.
- (iv.) **Q. B. D.—Construction—Trust—Discretion.**—A testator gave his residue to his father "for his own use and benefit, and at his discretion for the further use and benefit" of the testator's only child, who was then an infant. *Held*, that the father took the residue as trustee for himself and the child as joint tenants, the father having a discretion as to the application of the child's share during its minority.—*Atkinson v. Atkinson*, 62 L.T. 735.
- (v.) **Ch. D.—Construction—Intestacy—Exclusion of Next-of-Kin.**—A testator gave certain legacies, and revoked all former wills, and proceeded, "and hereby utterly and for ever excluding any and all relatives except my two dear nieces aforesaid from any and all advantages or benefit in this my last will and testament, I hereby lastly nominate,

constitute and appoint my said two dear nieces" and certain others executors and executrices of his will. *Held*, that the residue devolved on the next-of-kin in spite of the words of exclusion.—*Holmes v. Holmes*, 62 L.T. 383.

- (i.) **Ch. D.—Construction—Gift to Children of A. at Twenty-five—Substitutionary Gift—Perpetuity.**—Gift to children of A. who should attain twenty-five, or, being daughters, attain that age or marry, with a gift over in case any child died under twenty-five leaving children who should attain that age, or, if daughters, marry under it, to such last-mentioned children in equal shares of the share which their parent would have taken if he or she had attained twenty-five. One of the children of A. attained twenty-five before the death of the testatrix. *Held*, that the gift was void for perpetuity. *Seemblc*, that if there had been no gift over to grand-children, then, the gift would have been good, as the period of distribution arrived when the eldest son attained twenty-five, and no after-born children could take.—*King v. Whitten*, 62 L.T. 391.
- (ii.) **Ch. D.—Construction—Investment—“Public Company.”**—A testator authorised the investment of his trust estate in “debentures or securities of any railway or other public company” in the United Kingdom. The F. Company was formed under the Companies Act, 1862, its shares were quoted on the Stock Exchange, and its debentures were dealt in, though not quoted, there. *Held*, without deciding what was in general a “public company,” that the debentures of this company were a mode of investment authorised by the will.—*Rickett v. Sharp*, 62 L.T. 364.
- (iii.) **Ch. D.—Construction—Next-of-Kin—Time for Ascertaining—Lapse.**—Testatrix bequeathed a legacy “to such person or persons as would have become entitled to my said husband’s personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving.” *Held*, that the persons to take, and the shares and proportions in which they were to take, were to be ascertained at the death of the husband, and that the share of one of the husband’s next-of-kin who predeceased the testatrix lapsed.—*Williams v. Davies*, 59 L.J. Ch. 305; 62 L.T. 362; 38 W.R. 528.
- (iv.) **C. A.—Construction—Substitution.**—Bequest in equal shares to the nephews and nieces of the testatrix not before named, “but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children.” *Held*, that the children of nephews and nieces dead at the date of the will were not entitled.—*Groves v. Musther*, L.R. 43 Ch. D. 569; 59 L.J. Ch. 290.
- (v.) **Ch. D.—Legacies—Charge on Realty—Sale—Rents Received before Sale.**—Testator gave his real estate to A, “he also paying thereout” certain legacies, one of which was to be paid to trustees, and he directed that the trustees should be possessed on certain trusts of the sum therein “directed to be paid to them and charged on” his real estate. A. occupied part of the real estate after the testator’s death until it was sold by order of the Court, and made profits by the sale of the crops. *Held*, that A. was not a trustee of the legacies, which were merely charged on the real estate; and that he was, therefore, not chargeable with an occupation rent or with the profits made out of the estate.—*Newbald v. Beckitt*, 62 L.T. 533.
- (vi.) **P. D.—Probate—Alterations.**—A testator wrote out a will in 1885, which he signed and dated, but did not have attested. He afterwards destroyed all except the last sheet, and wrote out two fresh sheets, which he attached to the last sheet. He inked over his signature in the presence of two witnesses, who signed the attestation clause. The will

was found after the testator's death with several material alterations, all in the testator's handwriting. On the application of the executor, in which the heir-at-law and next-of-kin concurred, held, that probate should be granted.—*Maule v. Maule*, 62 L.T. 702.

- (i.) **P. D.—Probate—Appointment—Revocable Deed-poll.**—A testatrix, in contemplation of her marriage, settled property on such trusts as she should by revocable deed or by will appoint. She executed a will which did not include the settled property, and afterwards executed two revocable deeds-poll, duly attested by two witnesses, which declared trusts from and after her death of the settled property. Held, that the deeds were testamentary instruments, and entitled to probate, together with the will.—*Milnes v. Foden*, L.R. 15 P.D. 105; 59 L.J. P. 62; 62 L.T. 498.
- (ii.) **P. D.—Probate—Intention.**—A testatrix having duly executed a will, subsequently executed a paper containing directions as to distributing her property, which was headed, "This is not meant as a legal will, but as a guide." Held, that it was not a valid testamentary document, and was not entitled to probate as a codicil.—*Ferguson-Davie v. Ferguson-Davie*, L.R. 15 P.D. 109; 62 L.T. 703.
- (iii.) **P. D.—Probate—Limited—Power—Subsequent Marriage—Wills Act, s. 18.**—A testator bequeathed to A. B. all the real and personal estate to which he might be entitled at the time of his death, or over which he had power of appointment. He subsequently married A. B., and did not make another will. Held, that the marriage did not revoke so much of the will as was an execution of the power of appointment, and that probate must be granted, limited to the property over which the testator had a power of appointment.—*In the goods of Russell*, L.R. 15 P.D. 111; 62 L.T. 644.
- (iv.) **C. A.—Probate—Non-Existent Document—Proof of Contents.**—After the death of A., his widow produced a paper, which purported to be his will, and under which she took a life interest in his entire property, which at her death was to be divided among the children of the marriage. The paper was subscribed with three names, one of which purported to be that of A., in his own writing. The other two names were signatures of witnesses. The widow occupied a freehold house, which was the only property of A., till her death eight years after that of A. She took no steps to prove the alleged will, which at her death was not forthcoming. The contents of the document were proved in Court, but there was no attempt to prove that it bore any date, or that there was any attestation clause. Held, that probate of the paper should be granted, as the last will of A.—*Harris v. Knight*, 62 L.T. 507.
- (v.) **P. D.—Probate—Separate Wills of English and Foreign Property.**—A domiciled Englishman made in England on the same day two wills, disposing of his English and African property respectively. The wills named separate executors, and each excluded the property disposed of by the other. Held, with the consent of the parties entitled in case of intestacy, that probate might be granted of the English will alone, with a note that an authenticated copy of the African will had been deposited in the registry.—*In the goods of Callaway*, 38 W.R. 528.
- (vi.) **P. D.—Probate—Two Wills—Alleged Revocation—No Evidence as to Second Will—Decree.**—The plaintiffs propounded a will c. 1881. The defendants alleged that it had been revoked by a will of 1884, which had itself been revoked by tearing, and asked for a decree against both wills. The plaintiffs denied the revocation. No evidence of the

execution of the second will was given. The Court pronounced for the will of 1881, but declined to pronounce against the alleged will of 1884.—*Grubb v. Grubb*, 62 L.T. 644.

[i.] **P. D.—Probate—Undue Influence.**—It is the duty of a person who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice, and he should take care that the testimony called in support of the will should not be that of himself alone. The mind of the testator should be perfectly free and untrammelled. The fact that a person who propounds a will by which he benefits largely is the person who alone took instructions for it and prepared it, or procured its preparation, is a circumstance of grave suspicion, and the will ought not to be pronounced for unless the suspicion is removed, and the Court is judicially satisfied that the terms of the document actually express the true wishes of the testator. The *onus probandi* is in every case on the person who propounds a will, and he must satisfy the Court that the instrument so propounded is the true last will of a free and capable testator.—*Parker v. Duncan*, 62 L.T. 642.

